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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1956

No. 690

GENEE M. CARREIRO, IRENE G. CARREIRO, individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and WELLS FARGO BANK,
Petitioners,

vs.

PHYLLIS BAEKGAARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

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Subject Index

		Page
I.	Opinions below	2
II.	Jurisdictional statement	2
III.	Questions presented	2
IV.	Statutes involved	3
V.	Statement of the case	4
VI.	Argument	7
	The opinion of the court below decided an important question of state law erroneously and in conflict with applicable state law. The opinion will be of national interest because there is no reported case in point in any of the federal or state courts	7
	California law does not govern this case	7
	If California law does apply, then the Court of Appeals erred in not following applicable decisions	9
	The law of contracts governs the rights of beneficiaries to contracts of insurance in California	11
	The lower court erred in failing to hold that the insured made a gift back to the primary beneficiary by not changing the beneficiary clauses of the policies	12
	The opinion of the lower court caused a conflict within the Ninth Circuit on the question of law involved in this case because of the doubt it casts on the earlier case of Beck v. Downey, 191 F. 2d 150 and 198 F. 2d 626	15
VII.	Conclusion	18

Table of Authorities Cited

Cases

Pages

Beck v. Downey, 9 Cir. 191 F. 2d 150 and 198 F. 2d 626 ..... 3, 15, 16, 17

Beck v. West Coast Life Insurance Co., 38 Cal. 2d 643, 241 Pac. 2d 544, 26 A.L.R. 2d 979 ..... 10, 11, 15, 16, 17

Blair v. New York Life Ins. Co., 104 P. 2d 1075, 40 Cal. App. 2d 494 9

Braun v. New York Life Ins. Co., 115 P. 2d 880, 46 Cal. App. 2d 335 9

Carter v. Carter, 88 So. 2d 153 10

Estate of Welfer, 110 Cal. App. 2d 262, 242 P. 2d 655 11

Grimm v. Grimm, 26 Cal. 2d 173, 157 P. 2d 841 14

Heydenfeldt v. Jacobs, 107 Cal. 373, 40 P. 492 11

Jenkins v. Jenkins, 112 Cal. App. 402, 297 P. 56 14

Miller v. Miller, 94 Cal. App. 2d 785, 211 P. 2d 357 14

Ostroff v. New York Life Ins. Co., 104 F. 2d 986 ..... 7, 8

Shaw v. Board of Administration, 109 Cal. App. 2d 770, 241 P. 2d 635 14

Thorpe v. Randazzo, 41 Cal. 2d 770, 264 P. 2d 38 14

Turner v. Metropolitan Life Insurance Co., 56 Cal. App. 2d 862, 133 P. 2d 859 11

Codes

California Civil Code, Section 1646 ..... 2, 3, 8

California Civil Code (Deering, 1949) page 290 3

28 United States Code, Section 1254 2

28 United States Code, Section 1335 4

28 United States Code, Sections 1338 and 2361 2

Texts

32 Corpus Juris, 1091, 1092 11

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No.

GENEE M. CARREIRO, IRENE G. CARREIRO, individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and WELLS FARGO BANK,
Petitioners,

vs.

PHYLLIS BAEKGAARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit.

Petitioners, by their counsel, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on October 3, 1956 reversing the judgment of the United States District Court for the Northern District of California, Southern Division.

I. OPINIONS BELOW.

The opinion of the Court of Appeals, filed on October 3, 1956, is appended to this petition as Appendix A (infra pp. i-xv). No opinion was made or filed by the District Court.

II. JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals was dated and entered on October 3, 1956. A petition for rehearing was denied on December 8, 1956 (Appendix B, infra p. xvi). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254. The District Court had jurisdiction under 28 U.S.C., Sections 1338 and 2361.

III. QUESTIONS PRESENTED.

(A) Where the primary beneficiary of life insurance policies waives her right to the proceeds of the policies by a property settlement agreement with the insured, and the policies provide that the secondary beneficiary is to take the proceeds if the primary beneficiary predeceases the insured, and the insured dies before the primary beneficiary without having changed the beneficiary provisions of the policies:

(1) Did California law govern the lower Court where the face amounts of the policies were payable at the home office of the insurance company at Boston, Massachusetts, and Section 1646 of the Civil Code of California provides that: "A contract is to be inter-

preted according to the law and usage of the place where it is to be performed."

(2) If California law does apply, did the lower Court commit error, where, in California, the law of contracts governs the rights of beneficiaries to contracts of insurance, and the secondary beneficiary was awarded the proceeds in spite of the fact that the contingency to her becoming eligible to take never occurred?

(3) If California law does apply, did the lower Court commit error in failing to hold, or even consider the question, that the insured made a gift back to the primary beneficiary by not changing the beneficiary clause of the policy, where there is applicable California authority to support such a holding?

(B) Did the opinion in this case modify the earlier case of *Beck v. Downey,* 9 Cir. 191 F. 2d 150 and 198 F. 2d 626, or are there now two cases in conflict within the same circuit?

IV. STATUTES INVOLVED.

California Civil Code, Section 1646.

A contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made.

California Civil Code (Deering, 1949) page 290.

V. STATEMENT OF THE CASE.

This action arose out of conflicting claims to the proceeds of three life insurance policies issued by the New England Life Insurance Company, on the life of Dr. George S. Carreiro, deceased, a resident of California at the time of death. The action was filed by New England Mutual Life Insurance Company, a Massachusetts corporation, as an action in interpleader under Section 1335 of Title 28, United States Code.

The issue in the case is "How shall the insurance benefits be awarded as to three women and as to the assured's estate?"; Genee M. Carreiro was the first and divorced wife of the assured and a citizen of California. Irene G. Carreiro was his second wife and a citizen of California; Phyllis Baekgaard was assured's daughter and a citizen of Illinois. Wells Fargo Bank & Union Trust Company (a California Corporation) intervened as the executor of the last will and testament of the assured.

Dr. Carreiro and Genee M. Carreiro were married in 1927 and Phyllis Irene Carreiro, now known as Phyllis Baekgaard, was the sole issue. Genee M. Carreiro is the primary beneficiary of the life insurance policies described in this litigation. In the event of her death before that of the assured, his daughter Phyllis was designated as the secondary beneficiary. In two of the policies, if both primary and secondary beneficiaries predeceased George Carreiro, proceeds were to be payable to the executor of his will. In the third policy, the assured's executor was secondary beneficiary as to part of the proceeds. In August,

1951, the doctor and Genee entered into a written property settlement, which provided in part as follows:

> "Sixth. The Husband shall receive and be entitled to the insurance policies hereinafter listed, free and clear of any claim of the wife thereto.
>
> "Seventh. (in part) The parties shall, at any time or times hereafter, make and execute and deliver any and all further or other instruments, papers or things as the other of said parties shall require for the purpose of giving full effect to these presents and the covenants, provisions and agreements thereof."

After making this agreement the doctor and Genee were divorced. Later the doctor married Irene and died one year thereafter, without having changed the beneficiaries of the policies in question and without having changed his last will and testament wherein Genee was named as a residuary legatee and executrix. Genee, the primary beneficiary, survived the assured.

On September 6, 1951, the insurance company directed a letter to Dr. Carreiro which stated as follows:

> "We wish to thank you for forwarding to us a certified copy of the Property Settlement Agreement between you and Mrs. Carreiro. The agreement has been attached to the permanent record at the home office and we can now consider that Mrs. Carreiro has no further community property interest in the policies.
>
> If you wish to make any changes in the beneficiary arrangement please advise and forms will

be prepared for your signature. We note that we are holding all of your policies with the exception of policy No. 842502, which is presently assigned to the bank."

The insurance policies which are the subject of this action provide on the first pages thereof as follows: "New England Mutual Life Insurance Company of Boston agrees to pay at its home office in Boston, Massachusetts, on receipt of due proof of the death of the insured, George S. Carreiro, the face amount of $..... to the beneficiary * * *."

Upon certain occasions prior to the execution of the aforesaid property settlement agreement Dr. Carreiro had signed change of beneficiary forms with the insurance company in question incident to borrowing certain sums of money (55).

The lower Court concluded that at the death of George Carreiro he had manifested by conduct or otherwise an affection and desire to benefit four persons, namely, his first wife, Genee Carreiro; his daughter, Phyllis Baekgaard; his second wife, Irene Carreiro; and his father, John J. Carreiro (57). The Court further concluded that the evidence placed before the Court was of such an inconclusive and contradictory nature that the invocation of principles of equity in requiring an equal division of the proceeds share and share alike was fit and proper (58).

Therefore the Court concluded that equity and justice would be best served by rendering a judgment under the terms and provisions whereof all of the proceeds of the policies would be equally divided

between the four persons, namely the first and second wives, the daughter, and the estate wherein the father had a $5,000 specific bequest.

VI. ARGUMENT.

THE OPINION OF THE COURT BELOW DECIDED AN IMPORTANT QUESTION OF STATE LAW ERRONEOUSLY AND IN CONFLICT WITH APPLICABLE STATE LAW. THE OPINION WILL BE OF NATIONAL INTEREST BECAUSE THERE IS NO REPORTED CASE IN POINT IN ANY OF THE FEDERAL OR STATE COURTS.

The holding of the lower Court presents serious questions involving the right of an assured to designate who he wants as beneficiary of his insurance, and the manner, mode and conditions of their taking. It poses the question: Can a Court disregard the plain language of a contract, and substitute its own terms in place of clear and express language used by the assured?

CALIFORNIA LAW DOES NOT GOVERN THIS CASE.

The Court of Appeals had no doubt that California law ruled this case and treated this issue, which is the crux of the case, in a footnote. In that footnote the Court of Appeals cited as its principal authority the case of *Ostroff v. New York Life Ins. Co.*, 104 F. 2d 986, and misstated the rule involved. The Court of Appeals in its opinion (footnote 3, page 8) states that the *Ostroff* case stands for the proposition "that California law was applicable where in ordinary course the repeated payments of premiums, constitut-

ing by far the greater number of performances of its terms, are to be performed in California." Actually, the rule of the *Ostroff* case is in 104 F. 2d at 989, and is as follows:

> "Without deciding what law would control the interpretation of the incontestability clause if the contract were entirely to be performed in New York, WE HOLD that since the policy is to be performed both in California and New York, and the case concerns the making and not the performance of the contract, the law of California, the place of making of the contract, controls."

After erroneously stating the rule of the *Ostroff* case, the Court of Appeals stated that this case "is similar to the Ostroff case". In the instant case the benefits were payable at the home office of the company in Boston, Massachusetts. Although the opinion of the Court of Appeals states that one of the policies in question was delivered in California, there is nothing in the record to indicate where the policies were delivered or where the premiums were paid. But the record does indicate that when the assured cancelled a policy the check came from the home office in Boston (R-72).

Had the Court of Appeals followed Civil Code, Section 1646, ("A contract is to be interpreted according to the law and usage of the place where it is to be performed") it would not have erred. Here, the benefits were payable at the home office in Boston, Massachusetts, and the premiums were payable at the home office in Boston, Massachusetts, or to any authorized agent. Obviously, the contract was *to be* per-

formed in Boston. The lower Court should not have concerned itself with surmisal as to where it might have been performed. Premiums might have been paid to any agent whether he was in French Equatorial Africa or at the North Pole. We are led to absurdities if we consider where premiums may have been paid to a company agent.

Two California decisions[1] are cited by the Court of Appeals (in the same footnote) as authority for the proposition that California law governs this case. Neither case is in point because both are distinguishable as being factually different. In both of those cases the insurance company paid benefits to the assured in California for a number of years and then attempted to cancel the policy on the ground that the assured had made misrepresentations in the application. Although premiums and benefits were *to be* paid at the home office of the insurance company in New York, among other things, the Court held that by paying benefits in California for a number of years the insurance company waived the right to insist that New York law applied. There is no factual reason for such a waiver in this case, so neither case is in point.

IF CALIFORNIA LAW DOES APPLY, THEN THE COURT OF APPEALS ERRED IN NOT FOLLOWING APPLICABLE DECISIONS.

Two cases are cited by the lower Court as its authority to award the proceeds to the secondary

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[1] *Braun v. New York Life Ins. Co.*, 115 P. 2d 880, 46 Cal. App. 2d 335; *Blair v. New York Life Ins. Co.*, 104 P. 2d 1075, 40 Cal. App. 2d 494.

beneficiary in spite of the fact that condition precedent to her taking never occurred. One is a California decision (*Beck v. West Coast Life Insurance Co.*, 38 Cal. 2d 643, 241 Pac. 2d 544, 26 A.L.R. 2d 979) and the other is from Florida (*Carter v. Carter,* 88 So. 2d 153). If California law is controlled, then the Florida decision is not applicable and will not be discussed.

The *Beck* case dealt with the unusual problem of what to do with the proceeds of a life insurance policy where the primary beneficiary murdered the insured, and the contingent beneficiary was not related to the murderer, and was living at the time of the murder. Should the Court give the proceeds to the contingent beneficiary or the estate of the insured? In awarding the proceeds to the contingent beneficiary the Court reasoned that the murderer could not defeat the rights of a third person by his own wrong. At page 647 the Court said:

> "The rule that prevents his profiting by his own wrong should not be involved in such a way as to prejudice the rights of the alternative beneficiary. In a word it appears to me that the crime of one person may prevent that person from the assertion of what would otherwise be a right, and may accelerate or beneficially affect the rights of third persons, but can never prejudice or injuriously affect those rights."

California will not allow the primary beneficiary to benefit by his own wrong. What would that Court have done in the *Beck* case if the contingent beneficiary were the parent or child of the murderer? Certainly the estate would have been awarded the

proceeds. So it is apparent that the *Beck* case is a hybrid in the law whose rule is limited to its own facts.

THE LAW OF CONTRACTS GOVERNS THE RIGHTS OF BENEFICIARIES TO CONTRACTS OF INSURANCE IN CALIFORNIA.

California follows the general rule that an insurance policy

> "being a voluntary contract, the parties may make it on such terms, and incorporate such provisions and conditions, as they see fit to adopt, and the contract as made measures their rights. . . ."
>
> 32 *Corpus Juris,* 1091, 1092.

Or stated another way:

> ". . . it has been definitely held in this State, as in other jurisdictions, that in cases such as this, involving the right to the proceeds of a life insurance policy, the law of contracts and not the law of inheritance is controlling; that beneficiaries under an insurance policy take by virtue of the contract of insurance rather than by the laws of succession; and that the laws of descents and distributions has no applicability to such cases."
>
> *Turner v. Metropolitan Life Insurance Co.,* 56 Cal. App. 2d 862, 865, 133 P. 2d 859 (hearing denied by Supreme Court).

Also, see

> *Heydenfeldt v. Jacobs,* 107 Cal. 373, 40 P. 492;
> *Estate of Welfer,* 110 Cal. App. 2d 262, 265, 242 P. 2d 655.

If the lower Court had followed these applicable California decisions, it would have been compelled to rule that the contingent beneficiary could not take the proceeds because the condition precedent to her taking never occurred. The logical conclusion would be to give the proceeds to the estate as undistributed property.

It should also be noted that if the lower Court chose to disregard the applicable rule of California contract law and give the proceeds to the secondary beneficiary, the executor should have been awarded $5,000.00 of New England Mutual Life Insurance Policy No. 1154064 because it was secondary beneficiary as to that amount. Settlement provision I of that policy provides as follows:

> "A. Five Thousand Dollars ($5,000.00) of the proceeds (or the entire proceeds if less than Five Thousand Dollars) will be paid, immediately upon the decease of the Insured, in one sum of said primary beneficiary, if she shall survive the Insured, otherwise to the executors, administrators or assigns of the Insured." (R 53)

THE LOWER COURT ERRED IN FAILING TO HOLD THAT THE INSURED MADE A GIFT BACK TO THE PRIMARY BENEFICIARY BY NOT CHANGING THE BENEFICIARY CLAUSES OF THE POLICIES.

The lower Court, in its opinion, disregarded the evidence and findings of the Trial Court and applicable California decisions which bears on the issue of whether the insured intended to make a gift back to the primary beneficiary of his insurance policies, by

not changing the beneficiary clauses therein after being notified by the company that this was necessary.

Finding No. XX (R 54) concerns a letter directed to the deceased insured by the insurance company which states, in part, as follows:

> "If you wish to make any changes in the beneficiary arrangement, please advise and forms will be prepared for your signature. . . ."

Finding No. XXI (R 55) states:

> "That subsequent to the date of the aforesaid written communication, George S. Carreiro had transactions with the aforesaid representative of the insurance company wherein his personal presence in the office of said insurance company was required; but at no time did George S. Carreiro request a change of beneficiary of the aforesaid policies, other than by forwarding the aforesaid property settlement agreement to the insurance company, or make any efforts with regard to compliance with the requirements of the aforesaid insurance company in regard to the change of beneficiary procedure."

Finding No. XXII (R 55) states:

> "That upon certain occasions prior to the execution of the aforesaid property settlement agreement, George S. Carreiro had signed change of beneficiary forms incident to obtaining loans concerning said policies."

All of this is now *res judicata.*

It is clear from the foregoing that the deceased assured had ample opportunity to change the bene-

ficiary by executing appropriate forms; that he had, prior to his divorce, executed change of beneficiary forms; that he had certain conversations and transactions with the insurance representatives after the execution of the property settlement agreement; that he had received a letter from the insurance company stating unequivocally that he would be required to sign the change of beneficiary form; and that notwithstanding all of this, he at no time made any effort to change the beneficiaries of the policies.

The cases of *Jenkins v. Jenkins,* 112 Cal. App. 402, 297 P. 56; *Grimm v. Grimm,* 26 Cal. 2d 173, 157 P. 2d 841; *Miller v. Miller,* 94 Cal. App. 2d 785, 211 P. 2d 357; *Shaw v. Board of Administration,* 109 Cal. App. 2d 770, 241 P. 2d 635; *Thorpe v. Randazzo,* 41 Cal. 2d 770, 264 P. 2d 38; support the position of the first wife that notwithstanding a release in a property settlement agreement, the proceeds of the policies are payable to her upon the death of the assured if a beneficiary change has not been executed. The *Thorpe* case states at 774:

> "The failure of the husband to exercise his power to change the beneficiary ordinarily indicates that he does not wish to effect such a change, but each case must be decided on its own facts."

During the course of the trial, considerable evidence was introduced relating to conversations by or with the decedent, George S. Carreiro. The Court made a finding relative to these conversations as follows:

> "That no creditable evidence was received or believed by the Court with respect to any Conver-

sations by or with decedent George S. Carreiro." (R 56)

This finding would have no bearing on the communications received by the assured from the insurance company or on his conduct or lack of conduct in regard to not changing the beneficiary provisions of the policies. The Court concluded (R 57 and 58) that at the date of his death, George S. Carreiro had manifested a desire to benefit four persons, namely, his first wife, his daughter, his second wife, and his father, and that the evidence was so inconclusive and contradictory that the proceeds should be divided equally among the four parties in this suit.

It is submitted that the lower Court in not even discussing this issue in its opinion neglected the very basis upon which the decision of the Trial Court was made. The findings mentioned above would have been ample for the Trial Court to give the entire proceeds of the policies to the first wife on the theory that he intended to make a gift back to her by failing to change the beneficiary provisions of the policies. Applicable California law *supra* is ample authority.

THE OPINION OF THE LOWER COURT CAUSED A CONFLICT WITHIN THE NINTH CIRCUIT ON THE QUESTION OF LAW INVOLVED IN THIS CASE BECAUSE OF THE DOUBT IT CASTS ON THE EARLIER CASE OF BECK v. DOWNEY, 191 F. 2d 150 AND 198 F. 2d 626.

The *Beck v. Downey* case and the *Beck v. West Coast Life Insurance Co.* case *supra* were identical

cases involving the same primary beneficiary and assured but the Federal and State Courts made conflicting decisions. In the Federal *Beck* case, the alternative beneficiary was the mother of the murderer, and the Court awarded the proceeds to the executor of the assured's estate. In the California *Beck* case, the alternative beneficiary was a friend of the assured and she was awarded the proceeds in preference to the assured's estate. The opinion in the instant case states that "The fact that in *Beck v. Downey* the alternative beneficiary was the mother of the murderer may have greatly influenced the decision of this Court." In the Federal *Beck* case, the Court said, at 191 Fed. 2d 150, 152:

> "The words 'if living' must be interpreted in the ordinary common sense meaning, namely, that the insured intended the proceeds to go to her mother-in-law if the beneficiary were not alive but was dead and buried. Had there been an intent to have the proceeds go to the contingent beneficiary in the event of the incapacity of the beneficiary while alive to take the proceeds, plain language to that effect could and certainly would have been used. We think the language of the policies was clear and unequivocal. Any disability of the beneficiary, such as civil death, assuming it to be applicable to this case, constitutes a sanction or penalty imposed upon the beneficiary, David A. Downey and affected only his rights and privileges."

The lower Court in this case on the last page of their opinion states as follows: "When the insured made the beneficiary his wife and then his daughter

upon the wife's death, what was the importance of the event? It was a mere mark that when she could not take, the daughter should. The event of importance was the inability of the wife to take."

Because of this conflict that we now have within the ninth circuit, the law in this jurisdiction is an unparalleled state of confusion. The Federal *Beck* case says that before the contingent beneficiary can take, the primary beneficiary must be dead and buried. The Carreiro case is to the contrary, and while it does not overrule the *Beck* case, it casts considerable doubt on it. By implication, the Federal *Beck* case tells us that the law of contracts governs the rights of beneficiaries to insurance policies, and the Carreiro case tells us that the law of testamentary disposition governs such rights.

The facts of the instant case make it one of first impression. It will be of national interest because there is no reported case in point in the United States. It involves a question which arises in thousands of divorce cases each year when insurance policies are involved in property settlement agreements. Can the parties to an insurance contract rely on the rights given them within the four corners of the instrument? Or must they guess what some Court may later say the intent was in spite of express language to the contrary?

VII. CONCLUSION.

For the foregoing reasons, the Court should issue a writ of certiorari so that the serious questions involved herein and the conflicts between the decisions in the lower Court and the California Supreme Court may be resolved.

Dated, January 11, 1957.

Respectfully submitted,

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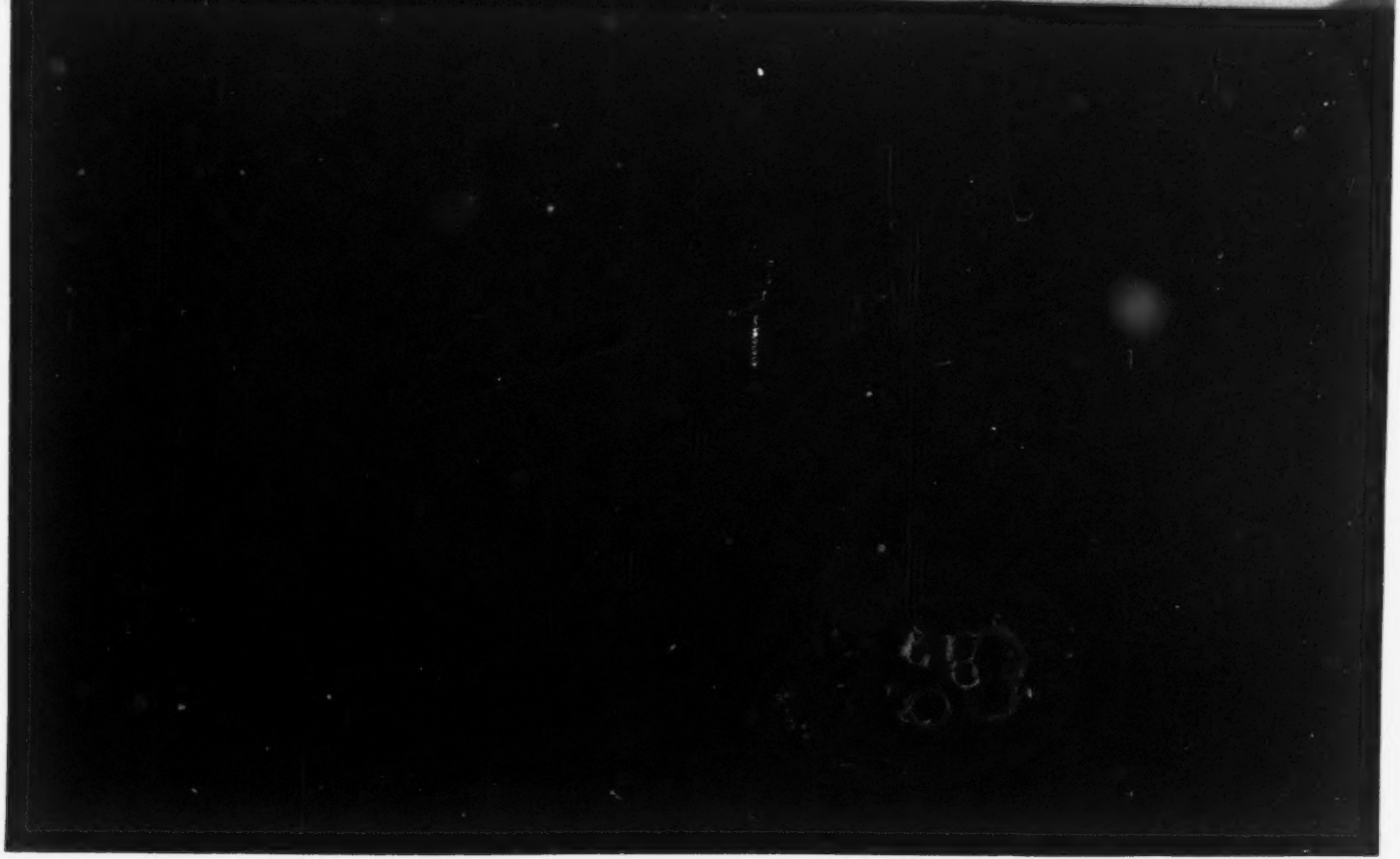
(Appendices A, B and C Follow.)



Appendix A

United States Court of Appeals
for the Ninth Circuit

Phyllis Baekgaard, formerly Phyllis Irene Carreiro, Appellant, vs. Genee M. Carreiro, Irene G. Carreiro, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and Wells Fargo Bank & Union Trust Company, Appellees.	No. 14,750 Oct. 3, 1956

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Before: Stephens, Bone and Chambers, Circuit Judges.

Stephens, Circuit Judge

This action arose out of conflicting claims to the proceeds of three life insurance policies in the total face amount of $25,000.00 issued by the New England Mutual Life Insurance Company on the life of Dr. George S. Carreiro, deceased, a resident of California at the time of death. The action was filed by New England Mutual Life Insurance Company, a Massa-

chusetts corporation, as an action in interpleader under Section 1335 of Title 28 United States Code. The issue in the case is how shall the insurance benefits be awarded as to three women and as to the assured's estate; Genee M. Carreiro, the first and divorced wife of the assured (a citizen of California); Irene G. Carreiro, his second wife (a citizen of California) and Phyllis Baekgaard, assured's daughter (a citizen of Illinois). These three were named as defendants and the proceeds from the policies were deposited in court. Wells Fargo Bank & Union Trust Company (a California corporation) intervened as the executor of the Last Will and Testament of the assured.[1]

Dr. Carreiro and Genee M. Carreiro were married in 1927 and *Phyllis* Irene Carreiro, now known as *Phyllis* Baekgaard was the sole issue.

The trial court adjudged a division of the policy proceeds among the claimants as an equitable solution of the problem and *Phyllis* Irene Carreiro, the daughter appealed. The insurance policy issued during the coverture of the doctor and *Genee* M. Carreiro with *Genee,* the wife, as primary beneficiary and *Phyllis* as the secondary beneficiary in the event that *Genee* predeceased Dr. Carreiro. If both primary and secondary beneficiaries predeceased Dr. Carreiro, the proceeds were to be payable to the Executor of his

[1]Another policy having a face benefit of $5,000.00 with Prudential Life Insurance Company of America was the subject of a separate action which is now on appeal before this court (No. 14,878) but in which further proceedings have been stayed pending determination of this appeal.

Will. In August, 1951, the doctor and *Genee* entered into a written property settlement. We have set out in part the text of the agreement in Note 2.[2]

An interlocutory decree of divorce was adjudged between the doctor and *Genee* and the final decree was adjudged the following August. The doctor and *Irene* Carreiro were married in December of 1952. Dr. Carreiro died January, 1954. The insurance policies in suit were in good standing and they were spe-

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[2]The text of the settlement—in part—is as follows:

"Whereas, the parties hereto are minded to forever adjust and settle any and all community property rights, property rights, rights to support or maintenance, and other matters between them;

"Now, therefore, it is agreed that in consideration of the mutual promises, agreements and covenants contained herein, it is covenanted, agreed and promised by each party hereto, to and with the other party hereto, as follows:

* * *

"Fourth: That said parties hereto each hereby waive any and all right to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by the laws of succession, and said parties hereby release one to the other all right to be administrator or administratrix or executor or executrix of the estate of the other, and hereby release and waive all right to inherit under any will of the other, and each of the said parties hereby waive any and all right of homestead in the real property of the other, probate or otherwise, and said parties hereby waive any and all right to the estate or any interest in the estate of the other for family allowance by way of inheritance, and from the date of this agreement to the end of the world said waiver of the other in the estate of the other party shall from the date of this agreement be effective and they shall have all the rights of single persons and maintain the same relation of such toward each other.

"Fifth: The husband and wife shall accept the provisions herein made for each of them in full satisfaction of the right of either to the community property or alleged separate property of either of them.

"Sixth: The property of the parties hereto shall be divided by said parties as follows:

cifically mentioned in the property settlement between the assured and *Genee,* the first wife.

The trial judge expressed his disbelief in respect of testimony of conversations with Dr. Carreiro re-

---

1. The wife shall receive and be entitled to all that real property situated in the City and County of San Francisco, State of California, described as follows:

(described)

* * *

* * *

7. The husband shall receive and be entitled to the insurance policies hereinafter listed, free and clear of any claims of the wife thereto.

Policy No. 820167 in the sum of $10,000, New England Mutual Life Insurance Company.

Policy No. 842502 in the sum of $15,000.00, New England Mutual Life Insurance Company.

Policy No. 725936 in the sum of $5,000.00, New England Mutual Life Insurance Company.

Policy No. 725937 in the sum of $5,000.00, New England Mutual Life Insurance Company.

Policy No. 5243932 in the sum of $5,000.00, Prudential Insurance Company of America.

Policy No. 1153064 in the sum of $15,000.00, New England Mutual Life Insurance Company.

"Seventh: The parties shall, at any time or times hereafter, make, execute and deliver any and all, such further or other instruments, papers, or things as the other of the said parties shall require for the purpose of giving full effect to these presents and to the covenants, provisions and agreements hereof.

* * *

"Ninth: That each of said parties fully and clearly understands each and every of the provisions herein contained, and the legal import and results thereof, and of the whole thereof, and that each of the parties has read this agreement in full and executes the same freely and voluntarily, and not under duress, menace, fraud or undue influence, coercion or intimidation of the other party, or of any other person or persons whatsoever, and that in any action between the parties now pending or hereafter to be commenced, that this agreement shall be offered in evidence for the approval of the court, and shall be the measure of their respective rights, and that the provisions hereof shall be incorporated in the, or any, decree therein rendered, such order containing a recital that it is predicated upon the terms of this agreement and not upon statutory authority."

lating to the latter's intentions as to the beneficiary of the policies in suit and held that the evidence before the court was inconclusive and contradictory and ordered the proceeds of the policies to be equally divided between the three women claimants and the bank as Executor.

Appellant argues that she is entitled to the entire proceeds since the primary beneficiary, *Genee* Carreiro, as a legal result of the property settlement agreement waived any expectancies in the policies, and thus she, *Phyllis,* as named secondary beneficiary became entitled to the proceeds of the policies in suit. In order to answer this contention, it is necessary to resolve the following questions:

(1) Did the primary beneficiary, *Genee* Carreiro, waive or relinquish her expectancy as a beneficiary under the policies by virtue of the property settlement agreement entered into with the deceased?

(2) If *Genee* Carreiro did so waive or relinquish such expectancy, does that fact have the legal effect of placing the secondary beneficiary in a position to take the proceeds even though the primary beneficiary is still living, or does it mean that the proceeds go into the assured's estate?

(3) In determining the legal effect of a waiver of expectancies under the facts of this case, the law of what jurisdiction is controlling?

LEGAL EFFECT OF THE PROPERTY SETTLEMENT

The position of a beneficiary in an insurance policy subject to change by the insured is similar to that of a beneficiary of a Will, a mere expectancy dependent on designation at the time of the insured's death. *Grimm v. Grimm,* 26 Cal. 2d 173, 176, 157 P. 2d 841. Where a property settlement agreement covers *all* of the property of the parties, and the wife, in accepting certain provisions for her benefit, fully releases the husband with respect to all other property, such release ordinarily would cover and include her interest as the designated beneficiary on an insurance policy; but where the language is not broad enough to encompass such an expectancy or an intent appears to exclude such rights as a present part of the settlement, the wife may still take as a beneficiary if the policy so provides. *Thorp v. Randazzo,* 41 Cal. 2d 770, 264 Pac. 2d 38, 40; *Miller v. Miller,* 94 Cal. App. 2d 785, 789, 211 P. 2d 357. For cases construing various property settlement agreements see: *Thorp v. Randazzo,* 264 P. 2d 38, 41 Cal. 2d 770; *Grimm v. Grimm,* 26 Cal. 2d 173, 157 P. 2d 841; *Meherin v. Meherin,* 99 Cal. App. 2d 596, 222 P. 2d 305; *Prudential Insurance Co. of America v. Quay,* 115 F. Supp. 63; *United Benefit Life Insurance Company v. Price,* Wash., 283 P. 2d 119; *In re Buchman's Estate,* 281 P. 2d 608.

It is evident, that in our case, the trial judge construed the property settlement agreement as effecting a relinquishment or waiver of any expectancies

that *Genee* Carreiro had or may have had in the future in the policies. Conclusion of Law I is in part:

> "Pursuant to the terms and provisions of the aforesaid policies and the terms and provisions of the property settlement agreement executed by and between Genee M. Carreiro and said George S. Carreiro as supplemented by events subsequent thereto, the proceeds of all policies were payable to neither Genee Mignon Carreiro, the designated beneficiary, nor to Phyllis Baekgaard, the secondary beneficiary. * * *"

Since *Genee* Carreiro was living at the time of George S. Carreiro's death and she was of record as the primary beneficiary of the policies in suit, it is clear that the trial judge could only refuse to award the proceeds to her if she had originally waived her expectancies under the policies unless there was convincing evidence that showed a different intent. It would appear that *Genee* Carreiro does not claim that she did not by the agreement waive her expectancies under the policies, but now claims the proceeds were later given to her, since in her "Answer to Pleading in Intervention" in paragraph II she states:

> "* * *
>
> "Said answering defendant and cross-complainant avers that at no time *since* receipt of notice of the *gift* of said insurance policies by the assured has she waived any rights to receive the proceeds therefrom." (Emphasis supplied)

Whether *Genee* did so concede or did not, if she had affirmatively shown that such was the intent of the

insured, it would have been the duty of the trial judge to award the proceeds to her. But the trial judge specifically stated that he was unable to ascertain what was the deceased's intent because, as the trial judge held, of the inconclusive and conflicting evidence and, therefore, the resort to what amounted to a compromise judicial adjustment of the issue. In this posture of the case, it was *Genee's* burden to convince the court that Dr. Carreiro intended that she should receive the insurance proceeds. She did not meet this burden!

We agree with the trial judge that *Genee* Carreiro by the property settlement waived and relinquished all right to the insurance proceeds. The policies were specifically listed and described and obviously were one of the bargaining elements between *Genee* Carreiro and Dr. Carreiro as to a division of their property. We note also that other things were "waived" under the agreement such as the right of each to take by Will from the other or to share in the other's estate, or to act as executor or executrix or administrator or administratrix. These provisions were held to be important considerations in interpreting the agreement in *Meherin v. Meherin,* supra, and *Thorp v. Randazzo,* supra. It was stated in the agreement that the husband was to receive the policies "free and clear of *any claims* of the wife thereto". (Emphasis supplied.) The only possible defect in the agreement was the failure to expand the meaning of "any claims" to include an "expectancy" under an insurance policy. But a disposition of *all* property rights

and "other matters" was clearly contemplated by the parties. As was said in *Meherin v. Meherin,* 222 P. 2d at page 306:

> "The property settlement agreement was quite comprehensive and clearly established that a complete and final settlement was intended."

In our case not only was there made mention of community property rights, but also of "property rights" and "rights to support and maintenance" and "other matters between them". The fact that there was a named secondary beneficiary is not in itself controlling, but we think that it is an element worthy of consideration in determining what was the intent of the parties to the agreement when it was executed. Here it can be argued that the deceased did not intend to give up valuable property to his wife as he did do and in addition to create a strong possibility that his divorced wife would also get the proceeds of the policies to the exclusion of his own daughter. Thus, it is certain that the court did not specifically decide the issue as to whether or not it was the insured's intention that *Genee* should take the proceeds of the insurance notwithstanding her waiver and relinquishment of any right to do so by the terms of the property settlement agreement. However, it is implicit in his decision and judgment that he disbelieved the evidence as to the claim of *Genee* that he gave her the right to the proceeds subsequent to the date of the property settlement. It seems, therefore, that *Genee* was not in a position to receive any part of the proceeds.

It can be argued from the fact that the doctor sent a copy of the agreement to the company that he wanted to inform the company that a change in beneficiary had been accomplished. It was not necessary for him to send the agreement to the company in order to divest his first wife of her community property interest. That divestment was complete when the agreement was executed and incorporated into the divorce decree. We hold that at the time of the execution of the agreement there was a waiver by *Genee* Carreiro of any and all interests in the policies.

EFFECT OF WAIVER ON SECONDARY BENEFICIARY

In summation to this point: *Genee,* the primary beneficiary is out of the issue. *Phyllis,* the daughter and secondary beneficiary, bases her claim to all of the insurance proceeds upon the contention that she succeeds to the vacancy and in effect becomes the primary beneficiary. The trial court's view as to such a claim is adverse and states:

> "The condition precedent to the payment of the proceeds to Phyllis Baekgaard * * * to wit, the death of the primary beneficiary, not having been fulfilled as of the death of the assured, said secondary beneficiary is not entitled to the proceeds of the aforesaid policies."

In this we think the trial judge read the policies with too much of an eye on the strictly literal wording and in our opinion the Supreme Court of California supports us. That California law rules this case is not

doubtful and we treat that jurisdictional question in the margin.[3]

CALIFORNIA LAW

In *Beck v. West Coast Life Insurance Co.*,[4] 38 Cal. 2d 643, 241 P. 2d 544, 26 A.L.R. 2d 979, the Supreme

---

[3]The insurance policies were issued by a Massachusetts corporation and the benefits or face amounts were payable at Boston, Massachusetts. The policies provided that premiums were payable either "at the Home Office, or they may be paid to an agent of the Company • • •". Apparently two of the policies were applied for and delivered in Honolulu, Hawaii, in 1932, and the other policy was applied for and delivered in California in 1942 after Dr. Carreiro had moved to San Francisco. Premiums were paid on all three policies to an agent of the company in San Francisco for a number of years, and the policies were also serviced at the San Francisco office of the company.

Section 1646 of the Civil Code of California provides that "A contract is to be interpreted according to the law and usage of the place where it is to be performed • • •". Appellees argue that the place of performance is Boston, Massachusetts, the place where the face amount of the policy is to be made, and therefore, California law is inapplicable. Appellant argues that under the facts of this case performance was in part at least in California and therefore, California law is applicable. We agree with appellant. This Court held in *Ostroff v. New York Life Ins. Co.*, 104 F. 2d 986, that California law was applicable where "in the ordinary course the repeated payments of premiums, constituting by far the greater number of performances of its terms, are to be performed in California." In that case the benefits of an insurance policy were payable in New York, but premiums were payable "at the Home Office of the Company or to an authorized agent of the Company • • •". For California cases in accord, see: *Braun v. New York Life Ins. Co.*, 115 P. 2d 880, 46 Cal. App. 2d 335; *Blair v. New York Life Ins. Co.*, 40 Cal. App. 2d 494, 104 P. 2d 1075. See also: *New York Life Insurance Co. v. Waterman*, 104 F. 2d 990.

Our case is similar to the *Ostroff* case. In addition, one policy was delivered in California and all policies were being serviced in California for a number of years. We hold California law to be controlling and binding on this and the District Court.

[4]See also: *Neff v. Massachusetts Mut. Life Ins. Co.*, Ohio, 1952, 107 NE 2, 100, and *Manufacturer's Life Ins. Co. v. Moore*, D. C. Calif., 1953, 116 F. Supp. 171.

Court of California held that where a life policy stated that the proceeds should be payable to a secondary beneficiary if the primary beneficiary predeceased the insured, the insured clearly indicated her desire and intent that any interest her estate might have in the proceeds should be subordinate to the interest of the secondary or alternative beneficiary, and hence where the primary beneficiary murdered the insured and was precluded from receiving the proceeds under the public policy of the State of California, the secondary or alternative beneficiary was entitled to the proceeds as against the insured's estate. We think the California Supreme Court's reasoning is applicable to our case. We quote from the cited case, page 546:

> "Because the beneficiary clause of a life insurance policy in which the insured has reserved the right to change beneficiaries is donative and testamentary in character, (citing cases) the intent of the insured as expressed by the language that she used should be given effect so far as possible. * * * Although her expressed intent that her husband receive the proceeds cannot be given effect, the policy names the one she wished to take if her husband could not. It stated that the proceeds should be paid to the alternative beneficiary, if the primary beneficiary predeceased the insured. Thus, in the type of disability that would naturally be anticipated by the insured, the alternative beneficiary was preferred over the estate of the insured. In this case there occurred the only other possible contingency in which the primary beneficiary would be under a disability equivalent

to actual death. The insured has clearly indicated her intent that any interest her estate might have in the proceeds of the policy should be subordinate to the interest of the alternative beneficiary. This intent is recognized by a holding that the alternative beneficiary may recover the proceeds * * *."

In the recent case of *Carter v. Carter,* Florida, 88 So. 2d 153, June 8, 1956, the insured was allegedly killed by his wife who was the primary beneficiary, and one of the questions for determination was whether a contingent beneficiary should receive the proceeds of the life policy or the insured's estate, if it be found that the wife unlawfully and intentionally killed the husband. The Florida Supreme Court expressly referred to and approved the California case of *Beck v. West Coast Life Ins. Co.,* supra, 38 Cal. 2d 643, 241 P. 2d 544, 26 A.L.R. 2d 979, and in so doing made the following comments (page 160):

"We must assume that the word beneficiary as used in a life insurance policy comprehends beneficiary in its broadest legal aspect and in that sense it necessarily must be considered as having reference to the survival of a *beneficiary eligible to take.* * * *" (Emphasis supplied)

* * *

"We prefer to adhere to what we consider to be the better rule which is the one that appears to give effect to the intent of the insured by paying the proceeds to the beneficiary first in priority *who is eligible under the law to receive the money.* In this case it would be the respondent. * * *" (Contingent beneficiary) (Emphasis supplied)

In our case the policies additionally show such an intent as they stated that if primary and secondary beneficiaries predeceased the insured, *then* the proceeds should go to the estate! But see: *Beck v. Downey,* 9 Cir. 191 F. 2d 150 and 198 F. 2d 626. In that case we noted that California law was *not* controlling after the Supreme Court of the United States had remanded the case to this court for a reconsideration in light of the California case of *Beck v. West Coast Life Insurance Co.,* supra. California law was held not to be controlling as the insurance policy in issue there was neither made, executed, delivered nor to be performed in California. No premiums had been paid in California. That is not the case that we now have before us. We are, therefore, bound to decide this case in light of the California Supreme Court decision. We think the California court would reach the same result that was reached in *Beck v. West Coast Life Ins. Co.,* supra, and award the proceeds to the alternative or secondary beneficiary, Phyllis Baekgaard.

We note that the decision of this court in *Beck v. Downey* is distinguishable from the California case in one decisive respect and that is that in the prior case before this court the secondary beneficiary was the mother of the murderer, while in the California case the secondary beneficiary was merely a friend of the murdered wife. The fact that in *Beck v. Downey,* the alternative beneficiary was the mother of the murderer may have greatly influenced the decision of

this court. This is evident as shown by the concurring opinion of Judge Fee in the case. (198 F. 2d 626).

When the insured made the beneficiary his wife and then the daughter upon the wife's death, what was the importance of the "death" event? It was a mere mark that when she could not take, the daughter should. *The event of importance was the inability of the wife to take.* That that event was brought about earlier and by agreement of the parties should and does leave the secondary beneficiary the prime one.

We hold that the entire proceeds of the policies should go to *Phyllis* Baekgaard, the daughter of the deceased.

Judgment reversed with instructions to proceed in accordance with this opinion.

(Endorsed:) Opinion. Filed, Oct. 3, 1956.

Reversed and remanded.

Paul P. O'Brien, Clerk.

Appendix B

United States Court of Appeals
for the Ninth Circuit

Excerpt from Proceedings of Saturday,
December 8, 1956

Before: Stephens, Bone and Chambers, Circuit Judges

ORDER DENYING PETITION FOR REHEARING

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellees, filed November 26, 1956, and within time allowed by rule of Court, and valid extension thereof, for a rehearing of the above cause be, and hereby is denied.

Appendix C

United States Court of Appeals
for the Ninth Circuit

Phyllis Backgaard, formerly Phyllis Irene Carreiro, Appellant, vs. Genee M. Carreiro, Irene G. Carreiro, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and Wells Fargo Bank & Union Trust Company, Appellees.	No. 14,750

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is reversed, with costs in favor of the Appellant, and against the Appellees, and that this cause be, and

hereby is remanded to the said District Court with instructions to proceed in accordance with the opinion of this Court.

It Is Further Ordered and adjudged by this Court, that the Appellant recover against the Appellee for her costs herein expended and have execution therefor.

(Endorsed:) Judgment

Filed and Entered: October 3, 1956

Paul P. O'Brien, Clerk.

No. 690

No. 14750

FILED
JAN 12 1957
JOHN T. FEY, Clerk

United States
Court of Appeals
for the Ninth Circuit

Exhibits in custody of Clerk.

PHYLLIS BAEKGAARD, Formerly Phyllis Irene Carreiro,

Appellant.

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased and WELLS FARGO BANK & UNION TRUST COMPANY,

Appellees.

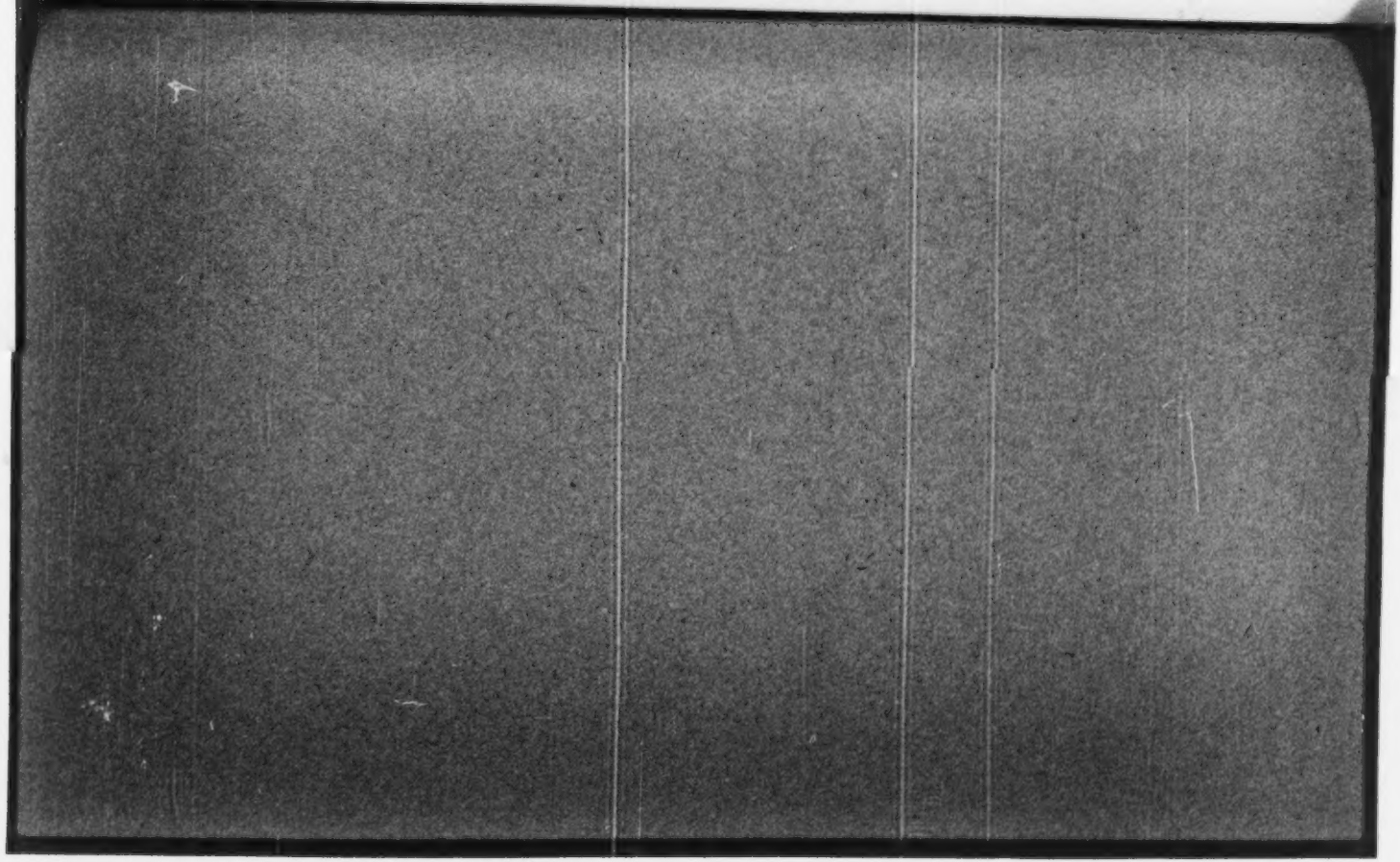
Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED
DEC 27 1956

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. 12-27-56

PAUL P. O'BRIEN, CLERK



No. 14750

United States Court of Appeals
for the Ninth Circuit

PHYLLIS BAEKGAARD, Formerly Phyllis Irene Carreiro,

Appellant.

vs.

GENEE M. CARREIRO, IRENE G. CARREIRO, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased and WELLS FARGO BANK & UNION TRUST COMPANY,

Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-11-55

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

PAGE

Answer and Cross-Complaint of Phyllis Baekgaard 29

Answer and Cross-Complaint of Genee M. Carreiro 22

Answer and Cross-Complaint of Irene G. Carreiro 34

Answer to Pleading in Intervention by Phyllis Baekgaard 42

Answer to Pleading in Intervention by Genee M. Carreiro 45

Answer to Pleading in Intervention by Irene G. Carreiro 48

Appeal:

- Certificate of Clerk to Record on..... 146
- Notice of 61
- Notice to Transmit Record on..... 61
- Order Extending Time to Docket Record on 62
- Statement of Points on..... 150

Attorneys, Names and Addresses of..... 1

Certificate of Clerk to Record on Appeal..... 146

Complaint 3

- Ex. A—Special Settlement Request..... 8
- B—Special Settlement Request..... 15

INDEX

PAGE

Exhibit, Defendant's:

G-1—Letter Dated September 6, 1951.... 68

Exhibit, Plaintiff's:

B—Interlocutory Judgment of Divorce and Property Settlement Agreement..... 138

Findings of Fact and Conclusions of Law..... 49

Judgment 59

Notice of Appeal..... 61

Notice to Transmit Record on Appeal..... 61

Order Allowing Intervention..... 37

Pleading in Intervention..... 39

Order Extending Time to Docket Record on Appeal 62

Statement of Points on Appeal..... 150

Transcript of Proceedings, Excerpts of..... 132

Transcript of Proceedings..... 63

Witnesses, Defendant's:

Carreiro, Irene

—direct 84

Sacchi, Peter J.

—direct 91

Sacchi, Shirley

—direct 94

Stuart, Lorraine

—direct 65

—cross 73, 74, 79, 81

NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Plaintiff and Appellee.

In the United States District Court in and for the Northern District of California, Southern Division

33433 Civil

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

GENEE M. CARREIRO, Also Known as GOLDIE M. CARREIRO, IRENE G. CARREIRO, Individually, and as Administratrix of the Estate of George S. Carreiro, Deceased; and PHYLLIS BAEKGAARD, Formerly PHYLLIS IRENE CARREIRO,

Defendants.

COMPLAINT OF INTERPLEADER

Plaintiff, the New England Mutual Life Insurance Company, a corporation, complains of defendants and for a cause of action, under Title 28 U.S.C.A. Sec. 1335 and Sec. 2361, alleges:

I.

Plaintiff is a corporation, incorporated under the laws of Commonwealth of Massachusetts, and is admitted to do, and is doing a life insurance business in the State of California.

II.

Defendant Genee M. Carreiro, also known as Goldie M. Carreiro, is a citizen of the State of

California and a resident of the Northern District thereof.

III.

Defendant Irene G. Carreiro is a citizen of the State of California and a resident of the Northern District thereof.

IV.

Defendant Phyllis Baekgaard, formerly Phyllis Irene Carreiro, daughter of the insured under the below-mentioned policies, is a citizen of the State of Illinois and a resident of the Northern District thereof.

V.

Plaintiff made, issued and delivered to George S. Carreiro on or about January 20, 1932, its Policies No. 725,936 and No. 725,937 and on or about March 2, 1942, its Policy No. 1,154,064, insuring his life in the aggregate face amount of Twenty-five Thousand Dollars ($25,000.00).

VI.

Plaintiff has received notice that the insured died on or about the 2nd day of January, 1954.

VII.

The amount of said Policy No. 725,936, namely, Five Thousand Dollars ($5,000), together with dividend accumulations of Seven Hundred Eighty-three and 27/100 Dollars ($783.27), or a total sum of Five Thousand Seven Hundred Eighty-three and 27/100 Dollars ($5,783.27), together with the amount of said Policy No. 725,937, namely, Five Thousand Dollars ($5,000), together with dividend accumula-

tions of Seven Hundred Eighty-three and 27/100 Dollars ($783.27), or a total sum of Five Thousand Seven Hundred Eighty-three and 27/100 Dollars ($5,783.27), together with the amount of said Policy No. 1,154,064, namely, Fifteen Thousand Dollars ($15,000), together with dividend accumulations of Seven Hundred Five and 54/100 Dollars ($705.54), or a total sum of Fifteen Thousand Seven Hundred Five and 54/100 Dollars ($15,705.54), comprises an aggregate total sum of Twenty-seven Thousand Two Hundred Seventy-two and 08/100 Dollars ($27,-272.08) which is payable by Plaintiff to the person or persons entitled thereto in accordance with the terms of Special Settlement Requests, attached hereto and made a part hereof as Exhibit "A" and Exhibit "B." Plaintiff claims no interest in said sum, and at all times has been and is now able and willing to pay said sum to the person or persons entitled thereto.

VIII.

Defendant Irene G. Carreiro claims the proceeds of said insurance as the widow, and special administratrix of the Estate of George S. Carreiro.

IX.

Defendant Phyllis Baekgaard claims the proceeds of said insurance because she is a beneficiary of record.

X.

Defendant Genee M. Carreiro, also known as Goldie M. Carreiro, claims the proceeds of said in-

surance as follows: Said defendant filed an action in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled "Genee M. Carreiro, also known as Goldie M. Carriero, Plaintiff, vs. New England Mutual Life Insurance Company and Irene G. Carreiro, Defendants," Action No. 435736, records of said court; that in and by these proceedings said Defendant is claiming the proceeds of said policies.

XI.

The claims of Defendants, and each of them, are adverse to each other, and such adverse claims are made by citizens of different states as set forth above.

XII.

Plaintiff has given bond for the full and faithful performance of its obligations under the above-mentioned Special Settlement Requests, payable to the clerk of the court in the amount of Twenty-seven Thousand Two Hundred Seventy-two and 08/100 Dollars ($27,272.08).

Wherefore, Plaintiff prays that Process issue on this Complaint directing Defendants to appear and answer; that a Restraining Order and an Order to Show Cause be issued, returnable at such time as the Court or Judge thereof shall specify, enjoining said Defendants from instituting or prosecuting any other suit or proceedings in any other State Court or United States Court affecting the Life Insurance

Policies and the proceeds thereof involved in this action until further order of this Court, and that such Process and Order be addressed to and served by the United States Marshals for the respective districts where claimants reside or may be found; that this Court hear and determine this case and discharge the Plaintiff from further liability and cancel said policies of Life Insurance, and permanently enjoin said Defendants from instituting or prosecuting any suit or any proceedings in any State or United States Court other than this proceeding, and allow Plaintiff its costs of suit and attorneys fees, and make any appropriate orders to enforce its judgment, and make such further orders and decrees as may be proper in the premises.

/s/ W. KEVIN CASEY,

/s/ JAMES F. THACHER,
THACHER, JONES, CASEY
& BALL.

State of California,
City and County of San Francisco—ss.

David S. Kamp, being first duly sworn, says:

That he is the Statutory Agent in and for the State of California of the Plaintiff, New England Mutual Life Insurance Company, a corporation, and makes this verification for and on behalf of said Plaintiff; that he has read the foregoing Complaint of Interpleader and knows the contents thereof,

and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters, that he believes it to be true.

/s/ DAVID S. KAMP.

Subscribed and sworn to before me this 24th day of March, 1954.

[Seal] /s/ LULU P. LOVELAND,
Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires August 27, 1955.

EXHIBIT A

BS
12/3/42
Ben-186-40
Com.

New England Mutual Life Insurance Company
Boston, Massachusetts

Special Settlement Request
and
Revocation of Previous Beneficiaries

Request is hereby made that Policies Nos. 725936, 725937, 820167 and 842502 be made payable, in case of the decease of the Insured, and subject to any indebtedness to the Company thereon or secured

thereby, in accordance with the following provisions; and any and all provisions for beenficiaries, for payment of the proceeds or for policy control inconsistent therewith are hereby revoked.

A. The proceeds payable upon receipt of due proof of the death of the Insured will be applied under the following provisions:

B. Goldie M. Carreiro, wife of the Insured, will be hereinafter referred to as primary beneficiary. Phyllis Irene Carreiro, daughter of the Insured, will be hereinafter referred to as secondary beneficiary.

C. The proceeds will be applied to the Second Option incorporated in the policy and monthly payments made thereunder for twenty (20) years certain and thereafter for life to said primary beneficiary, if she shall survive the Insured, shares of surplus interest to be paid monthly.

D. In the event said primary beneficiary shall not survive the Insured the proceeds will be applied to the Second Option incorporated in the policy and monthly payments made thereunder for twenty (20) years certain and thereafter for life to said secondary beneficiary, if she shall survive the Insured, shares of surplus interest to be paid monthly.

E. In the event said primary beneficiary shall decease while the Second Option provided in paragraph "C" is operative, the then present value of

any remaining unpaid guaranteed instalments thereunder will be applied to the Fifth Option of the Contingent Options of Payment contained in this agreement and, commencing immediately, monthly payments will be made of Seventy Dollars ($70) each, to said secondary beneficiary, if living.

If at any time there be no living payee entitled to any payment, the then present value of any guaranteed amounts unpaid for which there shall be no living payee will be paid in one sum to the executors or administrators of the last survivor of the Insured and all beneficiaries thereunder.

The proceeds will be the combined amounts due on such of the policies payable under the terms of this agreement as may be so payable upon receipt of due proof of the death of the Insured.

The proceeds will be increased by any additions, accumulated surplus and unpaid share of surplus, and reduced by any indebtedness to the Company on or secured by any policy and by any unpaid premium, or portion thereof, for the then current policy year.

The amount of any Retirement Income policy, if the Insured deceases while receiving instalments under the retirement income provision of such policy, will be the then present value of any remaining unpaid guaranteed instalments, commuted at three per cent (3%) interest, compounded annually.

The proceeds will include any amount payable under any Double Indemnity provision.

It is further understood and agreed, however, all provisions herein contained to the contrary notwithstanding, that the interest of any payee hereunder shall be conditional upon such payee's being alive at or after noon on the thirtieth day after the decease of the Insured and if a payee be not so living settlement will be made as though such payee had died before the Insured. If no payee be living at noon on said day, the proceeds will be paid in one sum to the executors or administrators of the Insured.

The Company shall not be required at any time to place under an Option for any payee an amount less than One Thousand Dollars ($1,000), and the payment by the Company of such an amount less than One Thousand Dollars ($1,000) in one sum to the payee then entitled to payments thereunder shall discharge the Company from all liability therefor.

The Company may at its option change the period of payment to quarterly, semi-annual or annual, if necessary to bring the amount of each periodic guaranteed payment to at least Ten Dollars ($10).

Except as otherwise expressly provided in this agreement, no payee shall have any right to assign, alienate, anticipate or commute any instalments or payments, to make withdrawals of proceeds, or to make any change in the above provisions; and, except as otherwise prescribed by law, no payment of

interest or of principal shall be subject to the debts, contracts or engagements of any payee, nor to any judicial process to levy upon or attach the same for the payment thereof.

If any provision hereof for payment to any payee or payees in instalments be held contrary to law, or in violation of any statute or statutes, of any State having jurisdiction, such illegality shall not affect other provisions of this agreement, and the value of any amount or amounts which would be payable under an Option to such payee or payees shall be paid in one sum to the person or persons for whose immediate benefit such value would then be applied under the above provisions, in full discharge of all liability of the Company with respect to such amount.

If at the decease of the Insured there is outstanding on any of said policies a collateral assignment to parties other than the Company, the above provisions shall be null and void with respect to the policy or policies so assigned, the proceeds of such policy or policies so assigned shall be paid in one sum, and, subject to the assignment, the beneficiary under such policy or policies shall be the person or persons for whose immediate benefit such proceeds would then be applied in accordance with the above provisions; Except, that if said assignee, prior to the settlement of the claim by the Company, shall execute a receipt for said assignee's demands, and release all interest in the assigned policy or policies, then the balance in excess of such demands shall be

payable in accordance with all provisions above set forth.

With respect to Policies Nos. 725936 and 725937, the right shall be reserved to the Insured, if living, on his sole signature, to change the beneficiaries, assign either of said policies as collateral security, or exercise for the Insured's own benefit any right, option or benefit contained in either of said policies, or permitted by the Company, and the right of any beneficiary shall be subject to any interest so created.

With respect to Policies Nos. 820167 and 842502, the right shall be reserved to the Insured, if living, on his sole signature, prior to the maturity date of a respective policy, to change the beneficiaries provided in such policy or method of settlement to such beneficiaries (including the right to change or revoke any and all provisions to be operative upon the maturity date of such policy), receive dividends, assign such policy as collateral security or to exercise any right, option or benefit contained in such policy or permitted by the Company, including the right to change all provisions governing control of such policy; and the rights of any beneficiary shall be subject to any interest so created.

With respect to Policies Nos. 820167 and 842502, the right shall be reserved to the Insured, if living, on his sole signature, after the maturity date of a respective policy and while receiving payments as provided in the face of such policy, to change the

beneficiaries named to receive settlement at his decease or method of settlement to such beneficiaries; Except, that if at the time of any such change any provision is to be made thereafter for income or instalment payments, any arrangement for such income or instalment payments may be made only by mutual agreement with the Company.

The Contingent Options of Payment, form BEN-186-40, is hereby made a part of this Special Settlement Request.

January 7, 1943.

/s/ GEORGE S. CARREIRO,
Insured sign here.

Witness:

/s/ C. HARVEY STULL,

/s/ GOLDIE M. CARREIRO.

Witness:

/s/ C. HARVEY STULL.

[Stamped]: A further beneficiary change has been endorsed.

Endorsed Boston, Mass., January 18, 1943.

/s/ MORRIS P. CAPEN.

EXHIBIT B

BS
12/3/42

New England Mutual Life Insurance Company
Boston, Massachusetts

Special Settlement Request
and
Revocation of Previous Beneficiaries

Request is hereby made that Policy No. 1,154,064 be made payable, in case of the decease of the Insured, and subject to any indebtedness to the Company thereon or secured thereby, in accordance with the following provisions; and any and all provisions for beneficiaries, for payment of the proceeds or for policy control inconsistent therewith are hereby revoked.

A. The proceeds payable upon receipt of due proof of the death of the Insured will be applied under the following provisions:

B. Goldie M. Carreiro, wife of the Insured, will be hereinafter referred to as primary beneficiary. Phyllis Irene Carreiro, daughter of the Insured, will be hereinafter referred to as secondary beneficiary. Interest payments under any Fourth Option, including shares of surplus interest, shall be paid monthly, commencing, with respect to such an Option becoming operative upon the decease of the Insured, one month after such decease.

Settlement I.

A. Five Thousand Dollars ($5,000) of the proceeds (or the entire proceeds if less than Five Thousand Dollars) will be paid, immediately upon the decease of the Insured, in one sum to said primary beneficiary, if she shall survive the Insured, otherwise to the executors, administrators or assigns of the Insured.

Settlement II.

A. Five Thousand Dollars ($5,000) of any balance of the proceeds, after the deduction of the portion of the proceeds required by the terms of Settlement I (or the entire balance if less than Five Thousand Dollars), will be applied to the Second Option and monthly payments made for twenty (20) years certain and thereafter for life to said primary beneficiary, if she shall survive the Insured, shares of surplus interest to be paid monthly.

B. In the event said primary beneficiary shall not survive the Insured, any amount that may be due under the provisions of this Settlement will be applied to the Second Option and monthly payments made for twenty (20) years certain and thereafter for life to said secondary beneficiary, if she shall survive the Insured, shares of surplus interest to be paid monthly.

C. In the event said primary beneficiary shall decease while the Second Option provided in paragraph "A" of this Settlement is operative, any remaining unpaid guaranteed instalments thereunder

will be paid as due to said secondary beneficiary, if living.

Settlement III.

A. Any remainder of the proceeds, after the deduction of the portions of the proceeds required by the terms of Settlements I and II will be retained by the Company under the Fourth Option and interest payments made to said primary beneficiary, if living, continuing, subject to the provisions hereinafter set forth in this Settlement, as long as said primary beneficiary shall live.

1. On and after August 1, 1946, the right shall be reserved to said primary beneficiary, if living, to make withdrawals from the amount remaining under the Fourth Option with the Company under the provisions of this Settlement, in whole or in part; also to elect that the amount remaining under the Fourth Option with the Company under the provisions of this Settlement, be applied for said primary beneficiary's benefit, immediately at the time of election, but not otherwise, to any Option of the Options of Payment, with such further withdrawal or commutation privilege as may be agreed upon between said primary beneficiary and the Company.

B. In the event said primary beneficiary shall not survive the Insured or if she shall decease after the Insured and while any provision above provided for in this Settlement is operative, any amount that

may be due under the provisions of this Settlement will be retained by the Company under the Fourth Option and interest payments made to said secondary beneficiary, if living, continuing, subject to the provisions hereinafter set forth in this Settlement, as long as said secondary beneficiary shall live.

1. The right shall be reserved to said secondary beneficiary, if living, to make withdrawals from the amount remaining for said secondary beneficiary's benefit under the Fourth Option with the Company under the provisions of this Settlement, in whole or in part; also to elect that the amount remaining for said secondary beneficiary's benefit under the Fourth Option with the Company under the provisions of this Settlement, be applied for said secondary beneficiary's benefit, immediately at the time of election, but not otherwise, to any Option of the Options of Payment, with such further withdrawal or commutation privilege as may be agreed upon between said secondary beneficiary and the Company.

General Provisions:

If at any time there be no living payee entitled to any payment, the then present value of any guaranteed amounts unpaid for which there shall be no living payee will be paid in one sum to the executors or administrators of the last survivor of the Insured and all beneficiaries thereunder.

If at any time any amount retained under any Fourth Option is reduced by any withdrawal or payment of principal, the amount of interest payments thereafter payable under such Option will be proportionately reduced.

It is further undeerstood and agreed, However, all provisions herein contained to the contrary notwithstanding, that the interest of any payee hereunder shall be conditional upon such payee's being alive at or after noon on the thirtieth day after the decease of the Insured and if a payee be not so living settlement will be made as though such payee had died before the Insured. If no payee be living at noon on said day, the proceeds will be paid in one sum to the executors or administrators of the Insured.

The Company shall not be required at any time to place under an Option for any payee an amount les than One Thousand Dollars ($1,000), and the payment by the Company of such an amount less than One Thousand Dollars ($1,000) in one sum to the payee then entitled to payments thereunder shall discharge the Company from all liability therefor.

The Company may at its option change the period of payment to quarterly, semi-annual or annual, if necessary to bring the amount of each periodic guaranteed payment to at least Ten Dollars ($10).

If, according to the above provisions, a payee would have any withdrawal right, commutation right, or right to elect a change of Option, the Com-

pany shall not be required to permit such right to be exercised after the decease of the Insured, except upon a payment date, and shall have the right to require ninety (90) days' notice in writing. The Company shall not be required to permit any payee to make more than four (4) partial withdrawals during any one contract year, nor to permit any partial withdrawal of an amount less than Fifty Dollars ($50). If by any withdrawal the balance retained for any payee would be reduced to less than One Thousand Dollars ($1,000), the Company shall have the right to pay such balance in one sum to the payee who would then be entitled to receive payments thereunder, in full discharge of all liability of the Company.

Except as otherwise expressly provided in this agreement, no payee shall have any right to assign, alienate, anticipate or commute any instalments or payments, to make withdrawals of proceeds, or to make any change in the above provisions; and, except as otherwise prescribed by law, no payment of interest or of principal shall be subject to the debts, contracts or engagements of any payee, nor to any judicial process to levy upon or attach the same for the payment thereof.

If any provision hereof for payment to any payee or payees in instalments be held contrary to law, or in violation of any statute or statutes, of any State having jurisdiction, such illegality shall not affect other provisions of this agreement, and the value of any amount or amounts which would be payable

under an Option to such payee or payees shall be paid in one sum to the person or persons for whose immediate benefit such value would then be applied under the above provisions, in full discharge of all liability of the Company with respect to such amount.

If at the decease of the Insured there is outstanding a collateral assignment to parties other than the Company, the above provisions shall be null and void, the proceeds shall be paid in one sum, and, subject to the assignment, the beneficiary under the policy shall be the person or persons for whose immediate benefit such proceeds would then be applied in accordance with the above provisions; Except, that if said assignee, prior to the settlement of the claim by the Company, shall execute a receipt for said assignee's demands, and release all interest in the policy, then the balance in excess of such demands shall be payable in accordance with all provisions above set forth.

All beneficiaries are appointed with right of revocation by the Insured and the Insured, acting alone, shall be the Owner.

January 7, 1943.

/s/ GEORGE S. CARREIRO,
Insured sign here.

Witness:

/s/ C. HARVEY STULL,

/s/ GOLDIE M. CARREIRO.

Witness:

/s/ C. HARVEY STULL.

[Stamped]: A further beneficiary change has been endorsed.

Endorsed Boston, Mass., January 18, 1943.

/s/ MORRIS P. CAPEN,
Secretary.

[Endorsed]: Filed March 25, 1954, U.S.D.C.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Defendant Genee M. Carreiro, also known as Goldie M. Carreiro, answers the complaint of interpleader of the above-entitled action and alleges as follows:

I.

Admits the allegations of Paragraphs I through VII, inclusive, of the aforesaid complaint.

II.

Said defendant alleges that she is designated as the beneficiary in policies Nos. 725,936, 725,937 and 1,154,064 issued by the plaintiff insurance company on the life of George S. Carreiro, now deceased.

III.

On or about the 2nd day of January, 1954, said assured, George S. Carreiro, died in the City and County of San Francisco, State of California.

IV.

At the date of the death of said assured all premiums which had accrued upon the aforesaid policies of insurance were fully paid.

V.

Said defendant presented to plaintiff insurance company notice and proofs of death of said assured and demanded payment of all sums payable to her as designated beneficiary of the aforesaid insurance policies.

VI.

The aforesaid payments due under said policies total the approximate amount of $28,000 and said sum nor any part thereof has not been paid notwithstanding plaintiff's demand therefor.

VII.

Said defendant is named in said policies as the primary beneficiary and defendant Phyllis Baekgaard, who is the daughter of said defendant, is named in said policies as the secondary beneficiary. The name of Irene G. Carreiro does not appear as a designated beneficiary in said policies.

As and for a Cross-Complaint Defendant Genee M. Carreiro, Also Known as Goldie M. Carreiro, Alleges the Following Causes of Action Against Plaintiff and Cross-Defendant.

I.

Plaintiff and cross-defendant New England Mutual Life Insurance Company is a corporation or-

ganized and existing under the laws of the State of Massachusetts and doing business in the City and County of San Francisco, State of California.

II.

Defendant and cross-complainant Genee M. Carreiro, also known as Goldie M. Carreiro, is designated as the primary beneficiary in policies Nos. 725,936, 725,937 and 1,154,064 issued by plaintiff and cross-defendant above named on the life of George S. Carreiro.

III.

The aforesaid assured, George S. Carreiro, died in the City and County of San Francisco, State of California, on or about the 2nd day of January, 1954.

IV.

At the date of the death of said assured all premiums which had accrued upon the aforesaid policies of insurance had been fully paid.

V.

Said defendant and cross-complainant prior to the date hereof presented to plaintiff and cross-defendant notice and proofs of death of said assured and demanded payment of all sums payable to her as the designated beneficiary of the aforesaid insurance policies.

VI.

The aforesaid payments due said defendant and cross-complainant under said policies total the approximate amount of $28,000 and said sum nor any

part thereof has not been paid defendant and cross-complainant.

Second Cause of Action

I.

On the 2nd day of January, 1954, in the City and County of San Francisco, State of California, plaintiff and cross-defendant New England Mutual Life Insurance Company became indebted to defendant and cross-complainant in the sum of $28,000 for money had and received by said plaintiff and cross-defendant for the use and benefit of defendant and cross-complainant.

II.

No part of said sum of $28,000 has been paid to defendant and cross-complainant notwithstanding her demand therefor.

Third Cause of Action

I.

Heretofore plaintiff and cross-defendant insurance company regularly issueed its ordinary life insurance policies upon the life of George S. Carreiro, which policies are designated as Nos. 725,936, 725,937 and 1,154,064. Said defendant and cross-complainant was at all times designated in said policies as the primary beneficiary and the person to whom the proceeds thereof would become payable upon the death of the assured.

II.

On or about the 2nd day of January, 1954, in the City and County of San Francisco, State of California, the assured indicated in said policies, namely, George S. Carreiro, died and at the date of his death all accrued premiums on said policies had been paid.

III.

On the date of death of said assured defendant and cross-complainant was the designated beneficiary in the aforesaid policies.

IV.

On the 7th day of August, 1951, said George S. Carreiro, the assured decedent hereinabove described, and defendant and cross-complainant entered into a property settlement agreement in writing, a correct copy of which is attached hereto and by this reference incorporated herein.

V.

Thereafter defendant and cross-complainant and said George S. Carreiro, the deceased assured, were divorced and subsequent thereto said deceased assured and defendant Irene G. Carreiro were married and at the date of death of said George S. Carreiro, the deceased assured, defendant Irene G. Carreiro was his legal wife.

VI.

At no time subsequent to the execution of the aforesaid property settlement agreement did the assured request the plaintiff and cross-defendant in-

surance company to change the names of the beneficiaries designated therein or delete the name of defendant and cross-complainant as the primary beneficiary therein specified.

VII.

A valid dispute exists between all parties hereto in that defendant and cross-complainant as the designated beneficiary of the aforesaid life insurance policies claims possession thereof and the right to payment thereunder, whereas defendant Irene G. Carreiro claims that as the surviving spouse of said assured, George S. Carreiro, she is entitled to possession of the aforesaid policies and payments thereunder by virtue of the terms and provisions of the aforesaid property settlement agreement, a copy of which is attached to this cross-complaint. Said defendant and cross-complainant alleges on information and belief that defendant Phyllis Baekgaard, the daughter of said defendant and cross-complainant, has made claim upon plaintiff and cross-defendant for the proceeds of said insurance policies, but the nature of and reasons assigned for said claim are not known to said cross-complainant. Said defendant and cross-complainant and defendant Irene G. Carreiro have made claim upon plaintiff and cross-defendant insurance company for payment incident to the aforesaid policies of life insurance and as a consequence of said conflicting claims said plaintiff and cross-defendant insurance company has refused and still refuses to make payment to either of said claimants or anyone else.

Wherefore, said defendant and cross-complainant prays for the judgment of this Court decreeing that the life insurance policies described herein be forthwith released unto said defendant and cross-complainant; that plaintiff and cross-defendant insurance company forthwith pay unto defendant and cross-complainant all sums of money due defendant and cross-complainant as a beneficiary designated in the aforesaid insurance policies in accordance with the terms and provisions thereof, together with accrued interest thereon; for a declaration of the rights of the parties hereto as they relate to the aforesaid insurance policies, and for such other and further relief as to the Court may appear proper in the premises.

/s/ REGINALD G. HEARN,
Attorney for Defendant and Cross-Complainant Genee M. Carreiro, Also Known as Goldie M. Carreiro.

Affidavit of service by mail attached.

[Endorsed]: Filed April 22, 1954.

In the United States District Court in and for the Northern District of California, Southern Division

No. 33433

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

GENEE M. CARREIRO, Also Known as GOLDIE M. CARREIRO, IRENE G. CARREIRO, Individually, and as Administratrix of the Estate of George S. Carreiro, Deceased; and PHYLLIS BAEKGAARD, Formerly PHYLLIS IRENE CARREIRO,

Defendants.

PHYLLIS BAEKGAARD,

Cross-Complainant,

vs.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY, a Corporation; GENEE M. CARHEIRO, Also Known as GOLDIE M. CARREIRO, IRENE G. CARREIRO, Individually and as Administratrix of the Estate of GEORGE S. CARREIRO, Deceased,

Cross-Defendants.

ANSWER AND CROSS-COMPLAINT

Comes now the defendant, Phyllis Baekgaard, formerly Phyllis Irene Carreiro, and answering plaintiff's Complaint of Interpleader, admits, denies and alleges:

I

This answering defendant admits the allegations, of said Complaint of Interpleader.

As and for a Second, Separate and Distinct Defense, and by Way of Cross-Complaint, cross-complainant, Phyllis Baekgaard, complains of cross-defendants, New England Mutual Life Insurance Company, Genee M. Carreiro, also known as Goldie M. Carreiro, and Irene G. Carreiro, and each of them, and alleges:

I.

That cross-complainant is a citizen of the State of Illinois, and a resident of the Northern District thereof.

II.

That cross-defendant, New England Mutual Life Insurance Company, is a corporation, incorporated under the laws of Commonwealth of Massachusetts, and is admitted to do, and is doing, a life insurance business in the State of California.

III.

Cross-defendant, Irene G. Carreiro, is a citizen of the State of California, and resident of the Northern District thereof.

IV.

That cross-defendant, New England Mutual Life Insurance Company, made, issued and delivered to George S. Carreiro on or about January 20, 1932, its policies No. 725,936 and No. 725,937, and on or about March 2, 1942, its Policy No. 1,154,064, insur-

ing his life in the aggregate face amount of $25,000.00.

V.

That on or about January 2, 1954, said George S. Carreiro died.

VI.

Cross-complainant is informed and believes, and therefore alleges, that the aggregate total sum of the aforesaid policies is $27,272.08.

VII.

That cross-defendant, Irene G. Carreiro, is the widow of said George S. Carreiro and claims the proceeds of said policies as the widow, and Special Administratrix of the Estate of said George S. Carreiro.

VIII.

That cross-defendant, Genee M. Carreiro, also known as Goldie M. Carreiro, claims the proceeds of said policies of insurance, as a beneficiary of record, of same,

IX.

Cross-complainant, formerly Phyllis Irene Carreiro, the daughter of George S. Carreiro, claims the proceeds of said policies of insurance, as a beneficiary of record, of same.

X.

That cross-defendant, Genee M. Carreiro, also known as Goldie M. Carreiro, is divorced from said George S. Carreiro, and prior to said divorce to wit: On or about August 7, 1951, entered into a Property

Settlement Agreement with said George S. Carreiro, a copy of said Agreement being attached hereto and made a part hereof, and incorporated herein.

XI.

That there is a bona fide dispute between cross-complainant and cross-defendants, Genee M. Carreiro, also known as Goldie M. Carreiro, and Irene G. Carreiro, and each of them, as to the person entitled to the proceeds of the herein mentioned policies of insurance; that the claims of cross-complainant and said cross-defendants are adverse to each other.

XII.

That cross-complainant has made demand on cross-defendant, New England Mutual Life Insurance Company, for payment of said sum set forth herein, and that said cross-defendant has refused, and now does refuse, to make payment to cross-complainant.

Wherefore, cross-complainant prays judgment, that cross-defendant pay into court the proceeds of said policies of insurance on the life of George S. Carreiro in the sum of $27,272.08; that the court award the cross-complainant the proceeds of said policies, in the aggregate sum of $27,272.08, and for such other and further relief as may be just and equitable in the premises.

/s/ ALFRED JAMES SMITH,
One of the Attorneys for
Phyllis Backgaard.

State of California,
City and County of San Francisco—ss.

Alfred James Smith, being first duly sworn, deposes and says:

That he is one of the attorneys for defendant and cross-complainant, Phyllis Baekgaard; that he makes this verification for and on behalf of said person who is absent from the City and County wherein affiant has his offices; that he has read the foregoing Answer and Cross-Complaint and knows the contents thereof; that same is true of his own knowledge except as to those matters stated therein on information and belief, and that as to those matters he believes it to be true.

/s/ ALFRED JAMES SMITH.

Subscribed and sworn to before me this 26th day of April, 1954.

[Seal] /s/ R. EDWARD BURTON,
Notary Public in and for the City and County of San Francisco, State of California.

My commission expires Sept. 25, 1957.

Affidavit of service by mail attached.

[Endorsed]: Filed April 27, 1954.

[Title of District Court and Cause.]

ANSWER AND CROSS-COMPLAINT

Defendant Irene G. Carreiro answers the complaint in the above-entitled action and alleges:

I.

Admits the allegations contained in Paragraphs I, II, III, IV, V, VI, VII and VIII.

II.

On the 7th day of August, 1951, said George S. Carreiro, the assured decedent, and defendant Genee Carreiro entered into a property settlement agreement in writing wherein, among other things, it was provided as follows:

7. The husband shall receive and be entitled to the insurance policies hereinafter listed, free and clear of any claims of the wife thereto:

Policy No. 820167 in the sum of $10,000.00, New England Mutual Insurance Company.

Policy No. 842502, in the sum of $15,000.00, New England Insurance Company.

Policy No. 725936, in the sum of $5,000.00, New England Insurance Company.

Policy No. 725937, in the sum of $5,000.00, New England Insurance Company.

Policy No. 1154064, in the sum of $15,000.00, New England Insurance Company.

Policy No. 5243932, in the sum of $5,000.00, Prudential Insurance Company.

III.

Thereafter defendant Genee Carreiro and said George S. Carreiro, the deceased assured, were divorced and subsequent thereto said deceased assured and defendant Irene G. Carreiro were married and at the date of death of said George S. Carreiro, the deceased assured, defendant Irene G. Carreiro was his legal wife.

IV.

On or about the 2nd day of January, 1954, in the City and County of San Francisco, State of California, the assured indicated in said policies, namely, George S. Carreiro, died, and at the date of his death all accrued premiums on said policies had been paid.

V.

A valid dispute exists between all parties hereto in that defendant Genee Carreiro as the designated beneficiary of the aforesaid life insurance policies claims possession thereof and the right to payment thereunder, whereas defendant Irene G. Carreiro claims that as the surviving spouse of said assured, George S. Carreiro, she is entitled to possession of the aforesaid policies and payments thereunder by virtue of the terms and provisions of the aforesaid property settlement agreement. Irene G. Carreiro have made claim upon plaintiff and cross-defendant insurance company for payment incident to the aforesaid policies of life insurance and as a consequence of said conflicting claims said plaintiff and cross-defendant insurance company has refused and

still refuses to make payment to either of said claimants or anyone else.

Wherefore, defendant and cross-complainant Irene G. Carreira prays for the judgment of this Court decreeing that the life insurance policies described herein be forthwith released unto said defendant and cross-complainant; that plaintiff and cross-defendant insurance company forthwith pay unto defendant and cross-complainant all sums of money due defendant and cross-complainant together with accrued interest thereon; for a declaration of the rights of the parties hereto as they relate to the aforesaid insurance policies, and for such other relief as to the Court may appear proper in the premises.

/s/ LESLIE C. GILLEN,
Attorney for Defendant and Cross-Complainant Irene G. Carreiro.

Duly verified.

[Endorsed]: Filed April 28, 1954.

In the District Court of the United States for the Northern District of California, Southern Division

No. 33433

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

Plaintiff,

vs.

GENEE M. CARREIRO, Also Known as Goldie M. Carreiro, IRENE G. CARREIRO, Individually, and as Administrator of the Estate of George S. Carreiro, Deceased; and PHYLLIS BAEKGAARD, Formerly Phyllis Irene Carreiro,

Defendants.

WELLS FARGO BANK & UNION TRUST CO.,

Intervener.

ORDER ALLOWING INTERVENTION

This cause coming on to be heard on the 12th day of July, 1954, before the Judge of said Court and the motion of Wells Fargo Bank & Union Trust Co., a corporation, to intervene, and the Court being satisfied that said corporation should be permitted to intervene and become a party herein, and in accordance with Federal Rules of Civil Procedure 24, it is therefore,

Ordered, that said party is hereby made a party to the cause for the purposes and with all the rights

provided by and in accordance with the Federal Rules of Civil Procedure, and the intervener shall receive notice of all proceedings herein;

Further Ordered, that the pleading in intervention of said intervener, attached to its motion, may be filed herein by intervener and served upon plaintiff and defendants or their respective attorneys within ten (10) days from the date of this order; and that within twenty (20) days after such service plaintiff and defendants, if so advised, may plead to the said pleading in intervention, in default of which, or to the extent not desired in such responsive pleading as the parties may file and serve, the averments thereof shall be deemed admitted;

Further Ordered, that in the event the issues raised by said pleadings in intervention and responsive pleadings by determined adversely to applicant, applicant shall be permitted to file a responsive pleading to the complaint herein, if so advised as intervener, as a defendant in the same manner and with like effect as if named an original party to the cause within a time fixed by the Court.

Done in open Court this 5th day of August, 1954.

/s/ O. D. HAMLIN,
Judge.

[Endorsed]: Filed August 5, 1954.

[Title of District Court and Cause.]

PLEADING IN INTERVENTION

Intervener alleges:

I.

That intervener is a corporation organized and existing by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco. That Plaintiff, New England Mutual Life Insurance Company, is a corporation organized and existing under the laws of Massachusetts. That Defendant Genee M. Carreiro is a citizen of the State of California; that defendant Irene G. Carreiro is a citizen of the State of California; that defendant Phyllis Baekgaard is a citizen of the State of Illinois. The Matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

That intervener is duly licensed by the State of California to conduct the business of corporate trustee and executor.

III.

That on the 22nd day of January, 1954, George S. Carreiro died in the City and County of San Francisco, State of California. Decedent left a Will naming Wells Fargo Bank & Union Trust Co., executor therein.

IV.

That on the 22nd day of June, 1954, intervener was duly appointed executor of the estate of George

S. Carreiro and letters testamentary were issued pursuant to order of the Court.

V.

That prior to the death of said George S. Carreiro a divorce was entered into between decedent and defendant Genee M. Carreiro and a complete and final property settlement was approved by the Court granting the divorce and filed therein as part of the decree.

VI.

That under paragraph 4 of said property agreement each party waived any and all rights to the estate of the other left at death and quit-claimed the right to share in the estate of the other by laws of succession, and said parties released one to the other all right to be administrator or administratrix or executor or executrix of the estate of the other, and each party released and waived all right to inherit under any will of the other.

VII.

That under paragraph 6 of the said property agreement the decedent, George S. Carreiro, was to receive the insurance policies, including policies issued by plaintiff company, Nos. 725,936, 725,937 and 1,154.064, free and clear of any claims of the wife hereto.

VIII.

That George S. Carreiro died before he had had opportunity to alter the beneficiary provisions of his Will or of the above-mentioned insurance poli-

cies. That said Genee M. Carreiro, though a beneficiary under both instruments, has waived all rights to receive the proceeds under either instrument.

IX.

That by virtue of these premises, the proceeds of insurance policies issued by plaintiff company belong to and are rightful assets of the estate of George S. Carreiro to be distributed to the heirs of said decedent according to law.

Wherefore, intervener prays that the Court decree that the moneys paid into Court by plaintiff, to-wit, the net proceeds of insurance policies Nos. 725,936, 725,937 and 1,154,064, issued by plaintiff company in the amount of $26,589.63, be paid to Wells Fargo Bank & Union Trust Co., as executor of the estate of George S. Carreiro, and that defendants Genee M. Carreiro, Irene G. Carreiro and Phyllis Baekgaard take nothing, and that intervener receive its costs of suit herein, and such further relief as the Court deems fit and proper in the premises.

WELLS FARGO BANK &
UNION TRUST CO.,
Intervener.

By /s/ COLIN C. KELLEY,
Attorney for Intervener.

[Endorsed]: Filed August 5, 1954.

[Title of District Court and Cause.]

ANSWER TO PLEADING IN INTERVENTION

Comes now the defendant, Phyllis Baekgaard, formerly Phyllis Irene Carreiro, and for answer to Pleading in Intervention of Wells Fargo Bank & Union Trust Co., Intervener, admits, denies and alleges:

I.

That at all times mentioned herein the Wells Fargo Bank & Union Trust Co., was a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City and County of San Francisco; that plaintiff, New England Life Insurance Company, is a corporation, organized and existing under and by virtue of the laws of the State of Massachusetts; that defendant, Genee M. Carreiro, is a citizen of the State of California; that defendant, Irene G. Carreiro, is a citizen of the State of California; that defendant, Phyllis Baekgaard, is a citizen of the State of Illinois; that the matter in controversy exclusive of interest and costs, exceeds the sum of Three Thousand ($3,000.00) Dollars.

II.

That on or about the 22nd day of January, 1954, George S. Carreiro, died in the City and County of San Francisco, State of California, leaving a Will naming Intervener, Executor therein.

III.

That prior to the death of said George S. Carreiro, said decedent and defendant, Genee M. Car-

reiro, were divorced, and a complete and final property settlement, settling community and separate property rights was entered into by and between said parties and approved by and filed as a part of said decree of divorce.

IV.

That pursuant to the terms of said property settlement agreement, said parties waived any and all right in and to the estate of the other, and released one to the other all right to be administrator, administratrix, or executor, or executrix, of the estate of the other, and further, said Genee M. Carreiro released to said George S. Carreiro, deceased, free and clear of any claims by said Genee M. Carreiro, those certain policies of Life Insurance Numbers, 725,936, 725937 and 1,154,064, issued by plaintiff, New England Mutual Life Insurance Company, on the life of said George S. Carreiro: That a copy of said agreement is attached hereto, and incorporated herein and made a part hereof.

V.

That said Genee M. Carreiro, was named as beneficiary under the terms of the herein mentioned policies of Life Insurance and that the defendant, Phyllis Baekgaard, was named as contingent beneficiary therein.

VI.

That heretofore by order of this Court, plaintiff deposited the proceeds of said policies with the Registry of this Court and that said plaintiff was thereby forever discharged from any and all fur-

ther liability under the terms and provisions, and/or special settlement requests of said policies.

VII.

That by reason of the premises, defendant, Phyllis Baekgaard, is lawfully and rightfully entitled to the proceeds of said policies, to the exclusion of all other persons.

Wherefore, this answering defendant, Phyllis Baekgaard, prays judgment that Intervener take nothing by reason of its Pleading In Intervention, and that same be dismissed and that this defendant have judgment against Intervener and defendants, Genee M. Carreiro and Irene Carreiro, and each of them, and that this Court Order and Decree that the net proceeds of said policies, the sum of Twenty-six Thousand Five Hundred Eighty-nine and 63/100 ($26,589.63) Dollars, be paid to this defendant, Phyllis Baekgaard, and that she receive her costs of suit herein and such other and further relief as to the Court may seem just and equitable in the premises.

/s/ ALFRED JAMES SMITH,
Attorney for Defendant,
Phyllis Baekgaard.

Duly verified.

Affidavit of service by mail attached.

[Endorsed]: Filed August 10, 1954.

[Title of District Court and Cause.]

ANSWER TO PLEADING IN INTERVENTION

Comes now defendant and cross-complainant, Genee M. Carreiro, also known as Goldie M. Carreiro, and answering the pleading in intervention in the above-entitled action, alleges as follows:

I.

Answering Paragraph VI thereof, denies each and every, all and singular, generally and specifically, the allegations therein contained.

II.

Answering Paragraph VIII thereof, denies each and every, all and singular, generally and specifically, the allegations therein contained.

Said defendant and cross-complainant avers that the aforesaid property settlement agreement, the terms and provisions of which are reflected in the pleadings herein, was executed on the 7th day of August, 1951, and the deceased assured died on the 22nd day of January, 1954; that a period of two years, five months and fifteen days elapsed between the date of the execution of the aforesaid property settlement agreement and the date of death of the assured.

Said defendant and cross-complainant further alleges that subsequent to the execution of the aforesaid property settlement agreement the assured was advised upon numerous occasions by said cross-

defendant insurance company that in order to change the beneficiary of the insurance policies reflected in the pleadings herein change of beneficiary forms must be executed by said assured; that said assured refused to sign said change of beneficiary forms and in addition thereto and upon numerous occasions made statements to employees and others that he did not wish to change the beneficiary provisions of the aforesaid policies and that he wished the proceeds thereof to be paid to his first wife, namely, Genee M. Carreiro, also known as Goldie M. Carreiro.

Said answering defendant and cross-complainant further avers that at no time since receipt of notice of the gift of said insurance policies by the assured has she waived any rights to receive the proceeds therefrom.

As and for a First Affirmative Defense to the Complaint in Intervention, Said Answering Defendant Alleges as Follows:

I.

Said defendant and cross-complainant and George S. Carreiro were husband and wife for a period of approximately twenty-four years.

II.

On the 7th day of August, 1951, said defendant and George S. Carreiro entered into a property settlement agreement, copies of which are reflected in the pleadings herein. Thereafter said defendant and George S. Carreiro were divorced and subse-

quent thereto said George S. Carreiro married Irene G. Carreiro. Approximately one year after the date of the second marriage and on or about the 22nd day of January, 1954, George S. Careiro died.

III.

The property settlement agreement which is the subject of this litigation provides in Paragraph Seventh thereof as follows: "The parties shall, at any time or times hereafter, make, execute and deliver any and all, such further or other instruments, papers or things as the other of the said parties shall require for the purpose of giving full effect to these presents and to the covenants, provisions and agreements hereof."

IV.

A period of two years, five months and fifteen days elapsed between the date the aforesaid property settlement agreement was executed and the date of death of the assured. During said period the assured was physically and mentally capable of complying with all requirements of the cross-defendant insurance company in regard to the execution of change of beneficiary forms and otherwise. Subsequent to the execution of the aforesaid property settlement agreement and upon more than one occasion cross-defendant insurance company by and through its lawful agent advised said assured change of beneficiary forms must be executed by said assured in order to give effect to the property settlement agreement. Notwithstanding said instructions said assured repeatedly refused to execute said

change of beneficiary forms and upon numerous occasions subsequent to the date of execution of said property settlement agreement said assured stated to various persons that he would not change the beneficiary under the aforesaid insurance policies, that he would not execute change of beneficiary forms and that he wanted the proceeds of said policies to go to his first wife, namely, said answering defendant and cross-complainant.

Wherefore, said answering defendant and cross-complainant prays that the intervener be dismissed and that the prayer of the answering defendant and cross-complainant set forth in her answer and cross-complaint heretofore filed in the above-entitled proceedings be granted and that this Court grant her such other and further relief as is proper in the premises.

/s/ REGINALD G. HEARN.

[Endorsed]: Filed August 11, 1954.

[Title of District Court and Cause.]

ANSWER TO PLEADING IN INTERVENTION

Comes now defendant and cross-complainant Irene G. Carreiro, and answering the pleading in intervention alleges as follows:

I.

Admits each and every allegation contained in paragraphs I, II, III, IV, V, VI, VII, VIII, and IX.

Wherefore, said answering defendant and cross-complainant prays that the answers of Genee M. Carreiro and Phyllis Baekgaard, be dismissed and that this defendant and cross-complainant have the relief she has heretofore prayed for in her answer and cross-complaint and that she have her costs and such other relief as is proper in the premises.

/s/ LESLIE C. GILLEN (W.T.T.),
Attorney for Defendant and
Complainant.

Duly verified.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 15, 1954.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action having come on for trial on the 28th day of December, 1954, all material parties litigant being represented by counsel and a jury trial having been waived, and evidence, both oral and documentary, having been introduced, and the Court being fully advised in the premises, the Court makes it Findings of Fact as follows:

I.

That decedent George S. Carreiro and Genee M. Carreiro were married in Honolulu on January 18, 1927.

II.

There was one child the issue of said marriage, namely, Phyllis Irene Carreiro, now known as Phyllis Irene Baekgaard, born May 2, 1928, and is now 26 years of age.

III.

That decedent George S. Carreiro and Genee M. Carreiro were divorced on August 22, 1952.

IV.

Said Genee and George Carreiro entered into a property settlement agreement on the 7th day of August, 1951, which, among other provisions, provided as follows:

> "Fourth: That said parties hereto each hereby waive any and all right to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by the laws of succession, and said parties hereby release one to the other all right to be administrator or administratrix or executor or executrix of the estate of the other, and hereby release and waive all right to inherit under any will of the other, and each of the said parties hereby waive any and all right of homestead in the real property of the other, probate or otherwise, and said parties hereby waive any and all right to the estate or any interest in the estate of the other * * *"

> "Fifth: The husband and wife shall accept the provisions herein made for each of them

in full satisfaction of the right of either to the community property or alleged separate property of either of them."

"Sixth:

"7. The husband shall receive and be entitled to the insurance policies hereinafter listed, free and clear of any claims of the wife thereto."

V.

Irene Carreiro and George Carreiro were married on the 20th day of December, 1952.

VI.

George Carreiro died on the 2nd day of January, 1954.

VII.

George Carreiro executed his Last Will and Testament on the 3rd day of January, 1951, and said Will had not been revoked at the date of death of said testator.

VIII.

The aforesaid Last Will and Testament was duly admitted to probate in the Superior Court of the State of California, in and for the City and County of San Francisco, Probate No. 130295, and Wells Fargo Bank, intervener in this action, duly qualified and was appointed executor.

IX.

Article Five of said Last Will and Testament sets up a testamentary trust for the benefit of the decedent's daughter in the event Genee Carreiro

predeceases George S. Carreiro and Phyllis has not attained the age of thirty-five.

X.

Article Six of said Last Will and Testament provides for the termination of said trust upon Phyllis Carreiro attaining the age of thirty-five.

XI.

Article Seven of said Last Will and Testament appoints intervener Wells Fargo Bank and Theodore Clifford Melim as trustees of said trust.

XII.

At the decedent's death the following described life insurance policies were in full force and effect: New England Mutual Life Insurance Company policies Nos. 725,936 for $5,000.00; 725,937 for $5,000.00; 1154064 for $15,000.00; Prudential Life Insurance Company No. 5243932 for $5,000.00.

XIII.

By written stipulation executed by counsel for all parties defendant and counsel for the intervener it was agreed that the proceeds of the aforesaid Prudential Life Insurance Company policy should be paid into the registry of this Court and disposed of in the same manner as the proceeds of the New England Mutual Life Insurance Company policies.

XIV.

At the date of the death of said George S. Carreiro all of the aforesaid life insurance policies designated Genee Mignon Carreiro as the primary beneficiary and in the event of her demise prior to

the death of George S. Carreiro the secondary beneficiary was designated as Phyllis Irene Carreiro, now known as Phyllis Irene Baekgaard, and in the event both beneficiaries predeceased the aforesaid testator the policies provided that the proceeds thereof should be payable to the executor of the Last Will and Testament of said testator.

XV.

The New England Mutual Life Insurance policy No. 1154064 provided under Settlement Provision I as follows:

> "A. Five Thousand Dollars ($5,000.00) of the proceeds (or the entire proceeds if less than Five Thousand Dollars) will be paid, immediately upon the decease of the Insured, in one sum of said primary beneficiary, if she shall survive the Insured, otherwise to the executors, administrators or assigns of the Insured."

XVI.

Genee Mignon Carreiro was alive at the date of death of said George S. Carreiro.

XVII.

Irene G. Carreiro is the surviving spouse and widow of George S. Carreiro.

XVIII.

Phyllis Irene Carreiro is the surviving daughter of George S. Carreiro and Genee M. Carreiro.

XIX.

John J. Carreiro is the surviving father of George S. Carreiro.

XX.

Subsequent to the execution of the aforesaid property settlement agreement George S. Carreiro forwarded a certified copy thereof to the local representative of the New England Mutual Life Insurance Company; that subsequent thereto and on the 6th day of September, 1951, the aforesaid local representative of the aforesaid company directed the following letter to George S. Carreiro:

"September 6, 1951.

"Dr. George S. Carreiro,
"490 Post Street,
"San Francisco, California.

"Re: Policies No. 725936-7, 820167, 842502 and 1154064

"Dear Dr. Carreiro:

"We wish to thank you for forwarding to us a certified copy of the property settlement agreement between you and Mrs. Carreiro. The agreement has been attached to the permanent records at the Home Office, and we can now consider that Mrs. Carreiro has no further community property interest in these policies.

"If you wish to make any changes in the beneficiary arrangement please advise and forms will be prepared for your signature. We note that we are holding all of your policies with the exception of Policy No. 842502 which is presently assigned to the bank.

"Yours sincerely,

"ASSISTANT CASHIER."

XXI.

That subsequent to the date of the aforesaid written communication George S. Carreiro had transactions with the aforesaid representative of the insurance company wherein his personal presence at the office of said insurance company was required; but at no time did George S. Carreiro request a change of beneficiary of the aforesaid policies other than by forwarding the aforesaid Property Settlement Agreement to the Insurance Company, or make any efforts in regard to compliance with the requirements of the aforesaid insurance company in regard to change of beneficiary procedure.

XXII.

That upon certain occasions prior to the execution of the aforesaid property settlement agreement George S. Carreiro had signed change of beneficiary forms incident to obtaining loans concerning said policies.

XXIII.

That the aforesaid Last Will and Testament of George S. Carreiro together with the life insurance policies hereinabove mentioned were kept by said George S. Carreiro in his office which was located in the City of San Francisco, State of California; that an original Last Will and Testament of the father of said George S. Carreiro was likewise kept with the aforesaid insurance policies and the Last Will and Testament of said George S. Carreiro.

XXIV.

That at a date subsequent to the execution of the aforesaid property settlement agreement, the divorce of said George and Genee Carreiro and the execution of said Last Will and Testament of George S. Carreiro, said George S. Carreiro destroyed the original Last Will and Testament of his father but he did not destroy his Last Will and Testament.

XXV.

That no creditable evidence was received or believed by the Court with respect to any conversations by or with decedent, George S. Carreiro.

XXVI.

That prior to the commencement of the subject litigation Genee Carreiro, Phyllis Baekgaard and Irene Carreiro discussed between themselves the matter of division of the insurance proceeds between themselves as and for a settlement of all disputes and said claims of said parties incident to the aforesaid insurance policies.

XXVII.

That counsel for Genee M. Carreiro, the first wife of said assured, Irene G. Carreiro, the second wife of said assured, and the executor of the Last Will and Testament of said assured stipulated that this Court could render its judgment wherein the proceeds of the aforementioned insurance policies would be equally divided between the first wife, the second wife, the daughter and the executor of

the Last Will and Testament of the deceased; that this Court effect a division in any manner which to this Court would appear equitable and just under the circumstances of this case.

As and for the Conclusions of Law from the Foregoing Findings of Fact, the Court Holds:

I.

Pursuant to the terms and provisions of the aforesaid policies and the terms and provisions of the property settlement agreement executed by and between Genee M. Carreiro and said George S. Carreiro as supplemented by events subsequent thereto, the proceeds of all policies were payable to neither Genee Mignon Carreiro, the designated beneficiary, nor to Phyllis Baekgaard, the secondary beneficiary. The condition precedent to the payment of the proceeds to Phyllis Baekgaard, the daughter of said assured, to wit, the death of the primary beneficiary, not having been fulfilled as of the date of death of the assured, said secondary beneficiary is not entitled to the proceeds of the aforesaid insurance policies.

II.

At the date of death of George S. Carreiro he had manifested by conduct or otherwise an affection and desire to benefit four persons, namely, his first wife, Genee Carreiro, his daughter, Phyllis Baekgaard, his second wife, Irene Carreiro, and his faher, John J. Carreiro.

III.

That the evidence placed before the Court was of such an inconclusive and contradictory nature that the invocation of principles of equity requiring a compromise of the claims of all parties hereto is fit and proper in the premises.

IV.

Equity and justice will best be served by rendering a judgment predicated upon the stipulation of counsel for Genee Mignon Carreiro, Irene G. Carreiro, and Wells Fargo Bank, under the terms and provisions of which the entire proceeds of the aforesaid insurance policies will be equally divided between Genee M. Carreiro, the first wife of said assured deceased, Irene G. Carreiro, the second wife of said assured deceased, Phyllis Baekgaard, the daughter of said deceased, and Wells Fargo Bank, executor of the Last Will and Testament of said assured deceased.

Now, Therefore, by reason of the premises and the findings aforesaid, it is, by the Court, Ordered, Adjudged and Decreed that the proceeds of the insurance policies which are the subject of the action and which have heretofore been deposited into this Court, be distributed evenly, share and share alike, between the parties hereto, each party to bear its own cost of suit.

Dated: February 16th, 1955.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

Approved as to Form (with exception of conclusion I).

/s/ REGINALD G. HEARN,
Attorney for Genee M. Carreiro.

[Endorsed]: Filed February 16, 1955.

In the District Court of the United States for the Northern District of California, Southern Division

No. 33433

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

Plaintiff,

vs.

GENEE M. CARREIRO, Also Known as Goldie M. Carreiro, IRENE G. CARREIRO, Individually, and as Administratrix of the Estate of George S. Carreiro, Deceased; and PHYLLIS BAEKGAARD, Formerly Phyllis Irene Carreiro,

Defendants.

WELLS FARGO BANK & UNION TRUST CO.,

Intervener.

JUDGMENT

The above-entitled cause came on for trial on the 28th day of December, 1954, before the above-en-

titled court, sitting without a jury; the intervener appearing and represented by its attorneys, Boekel, Moran & Morris and Colin C. Kelley; and the defendant, Genee M. Carreiro, appearing in person and by her attorney, Reginald G. Hearne; and defendant, Irene G. Carreiro, appearing in person and by her attorneys, Leslie C. Gillen and William Joyce; and defendant, Phyllis Baekgaard, appearing in person and by her attorney, Alfred James Smith and Errett O. Graham; and evidence both oral and documentary having been received, and the case having been argued and duly submitted, and the court being fully advised in the premises and having made its findings of fact and conclusions of law herein, that judgment be entered as follows:

Wherefore, by reason of the findings aforesaid,

It Is Hereby Ordered, Adjudged and Decreed that the proceeds of the insurance policies which are the subject of this action, and which have heretofore been deposited in this court, be distributed evenly, share and share alike, between the parties hereto, each party to bear its own costs of suit.

Done In Open Court this 24th day of February, 1955.

/s/ MICHAEL J. ROCHE,
Judge of the United States
District Court.

[Endorsed]: Filed February 24, 1955.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Phyllis Baekgaard, formerly Phyllis Irene Carreiro, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, from the final Judgment entered in this action 25 February, 1955.

/s/ AFLRED JAMES SMITH,
Attorney for Appellant, Phyllis Baekgaard, Formerly Phyllis Irene Carreiro.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 4, 1955.

[Title of District Court and Cause.]

NOTICE TO TRANSMIT RECORD ON APPEAL

To: C. W. Calbreath, Clerk, U. S. District Court:

Appellant requests that the following be transmitted to the United States Court of Appeals, 9th District, as the record on appeal:

1. The entire record, including all exhibits entered in evidence, and for identification;

2. All testimony.

Dated: This 4th day of April, 1955.

/s/ ALFRED JAMES SMITH,
Attorney for Appellant, Phyllis Baekgaard, Formerly Phyllis Irene Carreiro.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 4, 1955.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET RECORD ON APPEAL

Good Cause Appearing, It Is Hereby Ordered, that the time for filing and docketing the record on appeal in the above-entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same is hereby, extended to and including April 29th, 1955.

Dated: San Francisco, Calif., April 13, 1955.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed April 13, 1955.

The United States District Court, Northern District of California, Southern Division

No. 33433

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY,

Plaintiff,

vs.

GENEE M. CARREIRO, Also Known as Goldie M. Carreiro; IRENE G. CARREIRO, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased, and PHYLLIS BAEKGAARD, formerly Phyllis Irene Carreiro,

Defendants,

WELLS FARGO BANK & UNION TRUST COMPANY,

Intervener.

REPORTER'S TRANSCRIPT

December 28, 29, 1954
January 21, 1955
February 3, 16, 1955

Appearances:

For Plaintiff:
THACHER, JONES, CASEY & BALL.

For Defendant Genee M. Carreiro:
REGINALD G. HEARN, ESQ.

For Defendant Irene G. Carreiro:
LESLIE C. GILLEN, ESQ., by
WILLIAM T. JOYCE, ESQ.

For Defendant Phyllis Baekgaard:
ALFRED JAMES SMITH, ESQ., and
ERRETT O. GRAHAM, ESQ.

For Intervener:
BOEKEL, MORAN & MORRIS, by
COLIN C. KELLEY, ESQ.

* * *

Defendant Genee Carreiro will call Miss Lorraine Stuart as a witness.

LORRAINE STUART

was called as a witness on behalf of the defendant Genee Carreiro, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Court: Your full name, please? [23*]

A. Lorraine Stuart.

Q. S-t-e-w-a-r-t-? A. S-t-u-a-r-t.

Q. Where do you reside?

A. 3515 Fillmore, San Francisco.

Q. Fillmore Street. Your business or occupation, if any? A. Cashier, New England Mutual.

Q. Cashier where?

A. New England Mutual Life Insurance Company.

The Court: Cashier. Take the witness.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Lorraine Stuart.)

Direct Examination

By Mr. Hearn:

Q. Miss Stuart, how long have you been affiliated with the New England Mutual Life Insurance Company?

A. It will be eight years in January.

Q. And particularly what are your duties, incident to your employment?

A. Well, they are varied. I oversee the office and I, well, transact any changes on policies that are once put in force.

The Court: Would you be good enough to raise your voice so the reporter and attorneys on both sides will hear you?

Proceed.

Q. (By Mr. Hearn): In that connection, Miss Stuart, are you familiar with correspondence relative to policies? [24] A. Yes.

Q. Do you write letters, yourself? A. Yes.

Q. Do you sign letters? A. Yes.

Q. Have you done that for the last four or five years? A. Yes.

Q. In your capacity as an employee of the New England Mutual Life Insurance Company, did you ever have occasion to talk with Dr. George Carreiro, now deceased? A. Yes.

Mr. Kelly: Objection there, your Honor.

The Court: Is there any objection to all this testimony?

(Testimony of Lorraine Stuart.)

Mr. Kelly: I object to all the testimony, your Honor.

Mr. Hearn: That can be submitted, your Honor.

The Court: Maybe you don't follow what I am trying to do. I will allow all the testimony to go in, limiting it to the intent, and it is all subject to motion to strike and over your objection, so that it can go in.

Mr. Kelly: The objection runs all the way through?

The Court: Yes.

Mr. Hearn: This is for the purpose of foundation and establishing identity, your Honor.

The Court: All right.

Q. (By Mr. Hearn): Miss Stuart, had you seen Dr. Carreiro [25] on more than one occasion in your office? A. Yes.

Q. Did you ever have occasion to direct a letter to Dr. Carreiro, or letters to Dr. Carreiro, relative to any insurance policies? A. Yes.

Q. Do you have a file with you containing true and correct copies of those letters?

A. Yes, I do.

Q. Now, calling your attention specifically to dates at any time subsequent to August 7, 1951, did you direct a business letter relevant to insurance policies to Dr. George Carriero?

A. Yes, I did.

Mr. Kelly: What was the date, Counsel?

Mr. Hearn: August 7, 1951. I believe that is the

(Testimony of Lorraine Stuart.)

date of the property settlement agreement, your Honor.

Q. (By Mr. Hearn): Miss Stuart, do you have a copy of that letter with you? A. Yes, I do.

Q. May I see it? A. (Producing.)

Mr. Kelly: I thought you said August 7th.

(Conversation among counsel out of hearing of the reporter.) [26]

Q. (By Mr. Hearn): Miss Stuart, I have in my hand a copy of a letter which you handed to me, the copy being dated September 26, 1951, and I will hand this back to you momentarily and ask you whether that is a true and correct copy of an original letter that was sent by your office.

A. Yes, it was.

Q. Who prepared that letter? A. I did.

Q. Who signed the letter? A. I did.

Q. As an employee of the company, can you state under oath that that is a true and correct copy of the letter? A. Yes, I can.

Q. Is this the type of letter that is customarily kept by your company incident to the ordinary management of company affairs? A. Yes.

Mr. Hearn: Your Honor, I offer this as the Defendant Genee Carreiro's Exhibit 1 in evidence.

Mr. Kelly: I have no objection. I have the original letter; I will offer that in its place.

Mr. Hearn: All right, then, if I may return this? Thank you, counsel. If I may return this to you, I

(Testimony of Lorraine Stuart.)

will hand you momentarily—just a moment, [27] please.

Q. (By Mr. Hearn): Yes; I will hand you momentarily what purports to be the original of that letter. Is that the original, Miss Stuart?

A. That is the original.

Q. Is that your signature?

A. That is my signature.

Mr. Hearn: This letter is offered in evidence, your Honor, and for the purposes of the record I would like to read it into the record.

DEFENDANT'S EXHIBIT G-1

The letter, your Honor, is on the letterhead of New England Mutual Life Insurance Company. It is dated September 6, 1951; it is addressed to Dr. George S. Carreiro, 490 Post Street, San Francisco, California. Re.: Policies Nos. 725936-7, 820167, 842502 and 1154064.

"Dear Dr. Carreiro:

"We wish to thank you for forwarding to us a certified copy of the Property Settlement agreement between you and Mrs. Carreiro. The agreement has been attached to the permanent records at the Home Office, and we can now consider that Mrs. Carreiro has no further community property interest in these policies.

"If you wish to make any changes in the beneficiary arrangement, please advise and forms will be prepared for your signature. We note that we

(Testimony of Lorraine Stuart.)

are holding all [28] of your policies with the exception of Policy No. 842502 which is presently assigned to the bank.

"Yours sincerely,

"LORRAINE STUART,
"Assistant Cashier."

The Clerk: Defendant's Exhibit G-1 admitted and filed into evidence.

(Whereupon letter read above was received into evidence and marked Defendant's Exhibit G-1.)

Q. (By Mr. Hearn): Miss Stuart, that letter, incidentally, was deposited in the mail, was it not?

A. Right.

Q. At any time subsequent to the mailing of that letter, did you receive a written response in regard thereto? A. No.

Q. At any time subsequent to the mailing of that letter, did you receive from Dr. Carreiro requests for change of beneficiary forms? A. No.

Q. At any time subsequent to the date of that letter, did Dr. Carreiro, in fact, sign any change of beneficiary forms? A. No. [29]

Q. At any time subsequent to the date of that letter, did Dr. Carreiro call at your office?

A. I would say yes; I am not positive of any dates.

Q. And that was in person? A. Yes.

(Testimony of Lorraine Stuart.)

Q. Can you say or no, that he did in fact call?

A. Yes.

Q. You do know positively that he did call at your office? A. Yes.

Q. Would that be upon more than one occasion?

A. I would say yes.

Q. Can you state, in your own words, if you do know, the nature of the call and any business discussions that were had at that time or times?

A. Well, there was a surrender of two policies that he discussed——

The Court: Pardon me; I didn't hear that.

Q. (By Mr. Hearn): Speak up, please.

A. He had two policies he wanted to surrender and at two different occasions he did come in and talk about them.

The Court: To whom?

The Witness: Well, not to me—Mr.——

The Court: How do you know that he did?

The Witness: Well, because the policies were eventually surrendered, at the same time; I mean, he came in with [30] the intention of surrendering the policies.

The Court: Well, that will have to go out about his intention. We can only develop the facts, whatever they may be.

Did he submit those policies to you?

The Witness: Well, I was holding the policies.

The Court: Can you fix the time as best you can, as near as you can, approximately?

The Witness: Well, one of them was in Novem-

(Testimony of Lorraine Stuart.)

ber of '51 and the other in June of '52, because at the same time he did surrender those two policies.

The Court: To whom?

The Witness: To the company, for cash.

The Court: To the company—anyone in the company, you or someone else?

The Witness: Well, we send our policies back to our home office for cash, for cancelation.

The Court: He brought the policies down, did he?

The Witness: I had the policies.

The Court: Oh, you had the policies?

The Witness: Yes.

The Court: All right, proceed.

Mr. Hearn: Thank you, your Honor.

Q. (By Mr. Hearn): To clarify that——

The Court: Just a moment. [31]

Mr. Kelly: Do I understand those are two different policies that have nothing to do with this action?

The Witness: That's right.

Q. (By Mr. Hearn): Those policies were with your company, were they not? A. Yes.

Q. And those policies were in your possession, were they not? A. All except one.

Q. Now, incident to surrendering a policy, Miss Stuart, and obtaining cash therefor, are there certain procedural requirements that must be complied with by the insured? A. No.

Q. Does your company have certain forms to sign, or is there something an insured must do when he surrenders a policy?

(Testimony of Lorraine Stuart.)

A. No; no forms.

Q. What does an insured do when he wishes a policy surrendered in your company?

A. Well, they surrender the policy to us.

Q. Is that physically surrendering it?

A. Yes; we have to have it in our possession.

Q. And then what is done?

A. We forward it to our home office in Boston.

Q. And then thereafter what is done? [32]

A. We receive the check which we send to the insured.

Q. You receive a check for the surrender value of the policy? A. Yes.

The Court: Pardon me. So that I may follow the testimony, are these policies in issue here?

Mr. Hearn: No, your Honor; no, your [33] Honor.

* * *

The Court: Did I follow you, there were no forms?

The Witness: No forms for surrender.

The Court: Yes?

The Witness: No forms for surrender. [35]

* * *

Q. (By Mr. Hearn): Now, where is your office, Miss Stuart? A. 333 Pine Street.

Q. And how long has your office been at 333 Pine Street? A. Almost a year.

Q. Where was the office before?

A. In the Mills Building.

(Testimony of Lorraine Stuart.)

Q. In the Mills Building, and how long had it been at the Mills Building?

A. Oh, for 50 years.

Q. And was it at the Mills Building that Dr. Carreiro presented himself? A. Yes.

Q. Incidentaly, do you know where Dr. Carreiro's office was? A. Yes.

Q. Where? A. 490 Post.

Q. 490 Post.

Mr. Hearn: Thank you, Miss Stuart. No further questions.

Cross-Examination

By Mr. Kelly:

Q. Miss Stuart, my objections, beginning at the outset of your testimony, have nothing personal in—— [36]

The Court: He is apologizing to you already.

Mr. Kelly: Got me on the defensive.

Q. (By Mr. Kelly): Miss Stuart, I am going to read you from the property settlement agreement certain numbers of policies and will you tell me if those two policies that were surrendered are included in this property settlement agreement: 820167? Is that one of them? A. Yes.

Q. 842502? A. Right.

Q. Is that all that were surrendered?

A. Those two.

Q. Now, when the doctor surrendered those, did he have any other signatures from either Phyllis or Genee in order to surrender them?

(Testimony of Lorraine Stuart.)

A. No.

Q. They were his own property?

A. Right.

Q. Thank you. Now, when he came into this office on these various occasions, it had only to do with the surrender of these policies?

A. To my knowledge, yes.

Q. And to your knowledge nothing else was discussed? A. Not to me.

Mr. Kelly: That's all. Thank you. [37]

The Court: Any further questions?

Mr. Smith: Yes.

Cross-Examination

By Mr. Smith:

Q. Now, Miss Stuart, when he came into the office on these various occasions, did you talk to him on each occasion? A. Well, very little.

Q. Did you talk to him about the actual surrender of these policies? A. Yes.

Q. Do you recall what the nature of that conversation was?

A. Well, mainly to get him to keep them.

Q. In other words, you were trying to convince him that he should keep them, rather than to cash them in? A. Right.

Q. Did you fill out the forms with him necessary to cancel those policies?

A. There are no forms for surrender.

Q. In other words, the insured just comes in, gives you the policies and says, "I want to can-

(Testimony of Lorraine Stuart.)

cel it"? A. Right.

Q. When he came in to surrender these two policies in October and again in June, those would be the policy numbers 820167 and 842502, is that right? [38] A. Yes.

Q. Did he come direct to you or did he stop and talk to somebody else in the office?

A. Well, usually when it is a surrender of a big policy, and if Mr. Kamp is in, I would refer them to him.

Q. And who is Mr. Kamp?

A. He is the general agent.

The Court: The what?

The Witness: General agent.

Q. (By Mr. Smith): Did you refer Dr. Carreiro to Mr. Kamp on these occasions?

A. Yes.

Q. And he still came back and canceled them, is that correct? A. That's right.

Q. Now, calling your attention to this letter that you wrote on September 6, 1951, to Dr. Carreiro, when he sent in this property settlement agreement, did he bring that in or did he mail it in?

A. I don't recall. I believe that he brought it in, because we seemed to have no correspondence from him, mailing it in.

Q. Did he give it to you, or do you recall, or Mr. Kamp? A. I do not, no.

Q. Incidentally, how many other people are there in your office, or were there at the time, Sep-

(Testimony of Lorraine Stuart.)

tember 6, 1951, besides [39] yourself and Mr. Kamp?

A. Well, there were six of us in the office, girls in the office.

Q. And how many of those six people generally have contact or deal with insureds?

A. Well, all of them on occasions.

Q. All of them? A. Yes.

Q. Did you have contact with Dr. Carreiro on any occasion other than when he came in to cancel the two policies, surrender them?

A. You mean for discussion of anything else?

Q. Yes.

A. No. I might make an exception that—about premium payments.

Q. He came in——

A. I may have discussed with him on that.

Q. ——on premium payments; but to the best of your recollection, other than the cancellation or surrender of these two policies and premium payments, you never discussed these policies with Dr. Carreiro? A. No, I did not.

Q. You don't recall, do you, how this property settlement agreement came to get in your hands?

A. No, I don't. [40]

Q. Whether it was given to you directly by Dr. Carreiro or by Mr. Kamp or somebody else?

A. No, I don't recall.

Q. At whose instance or whose request was this letter of September 6, 1951, written?

(Testimony of Lorraine Stuart.)

A. Well, that's one of my duties, is to return documents back——

Q. Continue; return documents——

A. Yes.

Q. Well, you didn't return this property settlement agreement to him, did you?

A. No; I guess we just advised that it was on our permanent records. Usually we ask that they be returned from the home office. On this occasion we did not.

Q. Did you read that agreement?

A. No; I don't recall that I did.

Q. In other words, perhaps you can explain this. You say, I am quoting from your letter:

> "* * * we can now consider that Mrs. Carreiro has no further community property interest in these policies." A. That's right.

Q. And, as I recall, you said you didn't read that agreement, is that correct?

A. That's right. [41]

Q. So you don't know what was in it?

A. That's right.

Q. You don't know whether it was a community property settlement or a property settlement or just what it was?

A. Well, I wrote that letter—when I wrote that letter I was quoting from a letter from our Home Office.

Q. Do you have that letter from your Home Office? A. Yes, I do.

Q. May I see it? A. (Producing.)

(Testimony of Lorraine Stuart.)

Q. In other words, that first paragraph there in this letter of September 6 is actually a copy of a letter from the Home Office, is that correct?

A. That's correct.

Q. In substance. In changing beneficiaries under these policies, what is the usual procedure?

A. Well, if it's to be a simple settlement, that is, lump sum, we can prepare the forms in our office.

Q. No; I mean change beneficiaries, not settlement.

A. Well, it's all in one. If it is a settlement or change of beneficiary, it is all done on the same form. Two forms are prepared and they are signed, both copies and the policy are forwarded to our home office for endorsement by them.

Mr. Kelly: Your Honor, is this going outside the scope of your limitation now? [42]

The Court: Does this have to do with intent?

Mr. Smith: Well, I think it is proper on cross-examination in that Mr. Hearn goes into the letter on the question of intent and makes quite an issue of this request for a change of beneficiary.

The Court: Proceed.

Mr. Smith: And I think it is proper to go into it as to just how it is done.

The Court: Proceed.

Q. (By Mr. Smith): Well, in other words, you have these two forms and those are prepared. Who are they prepared by?

A. Well, I prepare or there are several other girls in the office that can prepare them.

(Testimony of Lorraine Stuart.)

Q. And then are they given to the policyholder to sign, something like that? A. Yes.

Q. And then sent on to the home office?

A. M-hm.

Q. Do you know—possibly this has been answered—of your own knowledge whether or not Dr. Carreiro at any time while you were working for the company ever made any changes or requests for change of beneficiaries?

A. He did at one time.

Q. Do you know what those are or were?

A. The only thing that he was changing was the method the [43] money was to be paid.

Q. But he never changed the actual beneficiaries on any of his policies?

A. He never signed forms and returned them.

Mr. Smith: I have no further questions.

Cross-Examination

By Mr. Joyce:

Q. Miss Stuart, the file you hold in your hand; is that the entire Carreiro file?

A. Yes; I have two files.

Q. Is this all of the correspondence that transpired between the insurance company and Dr. Carreiro? A. Yes.

Q. May I see it, please? A. (Producing.)

Q. Miss Stuart in the regular course of business, you wrote letters dated November 27, 1951, and June 27, 1952, one to Roland J. Wynne, assistant cashier, and the other to George S. Carreiro, did you not? Will you look at those? A. Yes.

(Testimony of Lorraine Stuart.)

Q. And both of these letters were written shortly after Dr. Carreiro's surrender of the two policies that you have testified to on direct examination?

A. Yes.

Q. And in the letter of November 27, 1951, it is a letter of transmittal to Mr. Wynne of the Wells Fargo Bank and [44] Union Trust Company, San Francisco, in which you say:

"Dear Mr. Wynne:

"We are enclosing our company check, No. 1402, in the amount of $18,570.65, which represents the full settlement of all claims under the above policy. A statement of the surrender is enclosed for your information."

Now, in the letter of June 27, 1952, to Dr. George S. Carreiro regarding Policy No. 820157 you state:

"Dear Dr. Carreiro:

"We are enclosing our company check, No. 1622, in the amount of $12,879.64 which represents the full settlement of all claims under the above policy. A statement of the claim is also enclosed for your information.

"We regret that you find it necessary to terminate this insurance protection, however, we are happy to be of service to you."

Both of those are your letters, aren't they?

A. Right.

The Court: Both to Wells Fargo?

Mr. Joyce: The latter letter is to Dr. Carreiro and the other one is to Wells Fargo, your Honor.

(Testimony of Lorraine Stuart.)

Both regarding Dr. Carreiro's insurance.

I would like to offer these into evidence, your Honor. [45]

The Court: They may be admitted and marked next in order.

The Clerk: Together?

Mr. Joyce: Yes.

The Clerk: On whose behalf, which defendant's?

Mr. Joyce: Irene.

The Clerk: Defendant's Exhibit I-2, admitted in evidence.

(Whereupon two letters referred to above and read from were received in evidence and marked Defendant's Exhibit I-2, collectively.)

The Court: Is that all from this witness?

Mr. Smith: I would like to ask her a few more questions, if the Court please.

Cross-Examination
(Resumed)

By Mr. Smith:

Q. Miss Stuart, referring to this letter of June 27, 1952, that was on Policy 820167, was it not?

The Court: The letter to Wells Fargo or whom?

Mr. Smith: That is the one to Dr. Carreiro.

The Court: Very well.

Mr. Smith: From Miss Stuart.

The Court: Very well.

Q. (By Mr. Smith): That's not one of the policies here, that was one of the earlier ones that we had discussed a few moments ago that he cashed in,

(Testimony of Lorraine Stuart.)

is that correct? A. Yes. [46]

Q. Miss Stuart, I have here a copy of a letter or memorandum of yours, I assume, dated January 19, 1954, which bears the initials down in the corner, "ls," which, I assume, is you. It is addressed to "Claim Department." That letter or memorandum was written by you?

A. That was written by me.

Q. What? A. That was written by me.

Q. It was written by you. And that was written in response to certain inquiries by Mrs. Carreiro or her attorney, is that correct?

Mr. Hearn: Which Mrs. Carreiro, Counsel, for the record?

Mr. Smith: Goldie Carreiro, Goldie M. Carreiro.

It reads as follows:

"Enclosed find Proof of Death, signed by Mrs. Goldie M. Carreiro, the named beneficiary under the above policies, evidence of her birth, affidavit and change of name order. Mrs. Carreiro would appreciate receiving the birth certificate and change of name order returned to her.

"We have not yet received the death certificate, tax waiver or policies. Mrs. Goldie M. Carreiro advised that the present spouse, Mrs. Irene Carreiro, had the policies and had turned them over to [47] her attorney.

"Today by telephone, we had a request from an attorney for Mrs. Irene Carreiro for claim forms. We advised Mr. Joyce that we would appreciate a

(Testimony of Lorraine Stuart.)

letter from him making this request which we would forward to your office. Mr. Joyce further advised that a claim would be made for the insurance. We have not forwarded claim forms to Mr. Joyce inasmuch as it is our understanding that only one set of claim papers may be issued and to the named beneficiary.

"This is one case which we are very much in doubt as to our responsibility, if any, and we would prefer to have any further requests or correspondence handled by your office."

Ask that be entered, if there is no objection.

Mr. Hearn: I don't see the purpose of admitting that, your Honor, but I have no objection. But I hate to see the record clouded with——

The Court: For the purpose of the record you might indicate the purpose of the offer.

Mr. Smith: I believe, the reason I am requesting that be entered is, in view of her former letter to Dr. Carreiro acknowledging receipt of the property settlement agreement, which they have designated as a community or settlement of [48] community property interests of Mrs. Goldie Carreiro.

The Court: For that limited purpose I will allow it.

The Clerk: Plaintiff's Exhibit P-3.

(Whereupon memorandum dated January 19, 1954, read above, was received in evidence and marked Defendant's Exhibit P-3.) [49]

* * *

IRENE CARREIRO

one of the defendants herein, was called as a witness in her own behalf and, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

The Court: Your name, please?

A. Irene Carreiro.

Q. Where do you live?

A. 101 Cervantes Boulevard.

Q. Located in San Francisco? A. Yes.

Q. And your business or occupation, if any?

A. I work at 3545 California Street, part time cashier, part time waitress.

The Court: Part time cashier and waitress. Take the witness.

Direct Examination

By Mr. Joyce:

Q. Mrs. Carreiro, when were you and the [53] late doctor married?

A. December the 20th, 1952.

Mr. Hearn: Will you speak a little louder, please? I can't hear you.

The Witness: December 20, 1952.

Mr. Hearn: December——

The Court: Twenty, 1952.

Q. (By Mr. Joyce): You are the widow of Dr. Carreiro, are you not, and his second wife?

A. Yes, I am.

Q. Mrs. Carreiro, how long had you known Dr. Carreiro before you and he were married?

Mr. Hearn: Objected to as being immaterial,

(Testimony of Irene Carreiro.)

your Honor. That isn't an issue before this Court. We concede the marriage.

Mr. Joyce: I have no objection to the objection, your Honor.

The Court: Is that all?

Mr. Joyce: No, no; if Mrs. Carreiro—whatever your Honor's ruling, it doesn't make any difference to us.

The Court: Well, I won't rule at all, then.

Mr. Joyce: May she answer the question?

The Court: Unless you indicate what the purpose of this testimony is.

Mr. Joyce: No; just a preliminary question, your Honor. [54] It has no particular bearing on it.

The Court: Very well, she may answer if it is only preliminary. What was it?

Mr. Joyce: It is just a preliminary question. All I was asking——

The Court: What was the question?

Q. (By Mr. Joyce): How long had you known Dr. Carreiro before you were married?

A. I had known him since, well, I first met him in August, July or August, I believe.

Mr. Hearn: What year?

The Witness: I don't recall the exact——

The Court: What year?

The Witness: In '51.

The Court: Just raise your voice. '51.

All right, proceed.

Q. (By Mr. Joyce): August, '51. And shortly after that period of time you and the late doctor

(Testimony of Irene Carreiro.)

began courtship, did you not? A. Yes.

Q. And you and the doctor saw one another quite frequently after that time, did you not?

A. Yes.

Q. Now, during that period of time, after you first met the doctor, did the doctor ever discuss the matrimonial [55] difficulties he had had with his first wife? A. Yes.

Mr. Hearn: Objected to, your Honor, on the grounds of immateriality, further on the ground of hearsay, also I seek to invoke the dead man statute.

The Court: Objection will be sustained. The ultimate fact is the marriage.

Mr. Joyce: Your Honor, if I might pursue this a moment——

The Court: The Court has ruled. You may proceed now.

Mr. Joyce: All right, your Honor.

I have forgotten what the question was; will you read it back, please?

Mr. Kelly: Matrimonial difficulties.

Mr. Joyce: Oh, yes.

Q. (By Mr. Joyce): Mrs. Carreiro, did the doctor ever tell you that he had any insurance?

A. Yes, he did.

Q. Did he tell you who he intended this insurance to go to?

Mr. Hearn: Objected to, your Honor, on the grounds of hearsay, further on the ground of the dead man statute, and further on the ground of immateriality.

(Testimony of Irene Carreiro.)

Mr. Joyce: Your Honor, it is not contrary to the dead man statute; the dead man statute refers to the claims [56] against estates only. Now, that's not the case here at all. It is not hearsay, because this is primary evidence of what the doctor, himself, said. It is real evidence, and I think it is admissible.

The Court: It is offered for what purpose?

Mr. Joyce: It is offered to prove the intent of the doctor. Now, there is a standing objection to that, but the Court has already ruled that all of that will be admissible subject to that objection.

The Court: With that understanding, I will allow it to go in, subject to your motion to strike and over your objection.

Mr. Hearn: Thank you, your Honor.

The Court: It will go in as testimony of intent.

Q. (By Mr. Joyce): Now, Mrs. Carreiro, before you and the doctor were married, did the doctor ever mention this insurance to you?

A. Yes, he did.

Q. Can you recall at any particular time or place the occasion where the doctor first mentioned this insurance to you?

A. Well, he first mentioned it when he was telling me about his divorce and settlement with Genee.

Q. Now, where did that conversation take place?

A. In my apartment. [57]

Q. Where was that located?

A. On Valencia.

Q. Approximately what month was that?

A. I don't recall. It was shortly after I met him.

(Testimony of Irene Carreiro.)

Q. And it was——

A. I would say probably in June.

Q. Before you married him? A. Yes.

Q. And now what was the substance of that conversation, what did Dr. Carreiro say to you regarding the insurance?

A. He said that, he was telling me about his divorce with Genee and he said that he had given Genee everything they had except his office and this insurance that he had at that time.

Mr. Hearn: Can't hear you, Mrs. Carreiro. I am awfully sorry.

A. (Continuing): He said that at the time he and Genee had the property settlement, or they had their separation, that he had given Genee everything he had except his office and his insurance.

Q. (By Mr. Joyce): Now, did you have any other conversation with the doctor about the insurance before you were married to him?

A. That, after that, he said that, when we were talking about getting married, he said, "All I have" —he was [58] telling me how we would have to live. He said, "All I have left is my office, my two hands to work with and this little bit of insurance."

Q. Now, where did that take place?

A. That was in my apartment on a Sunday afternoon.

Q. Were those the only conversations you had with the doctor relative to insurance prior to your marriage? A. Prior to our marriage.

(Testimony of Irene Carreiro.)

Q. Now, after your marriage to Dr. Carreiro, which took place December 20th of 1952, did you have any conversations with Dr. Carreiro about your insurance—his insurance? A. Yes.

Q. Now, where did that take place?

A. The first time, it was on, when we lived on Laguna.

Q. Approximately when?

A. Shortly after we were married.

Q. And what did the doctor say at that time about his insurance?

A. He brought the subject up one day when he said that he should get around to making out a new will, and the subject of the insurance came up and he said——

Mr. Hearn: Can't hear you, sorry.

A. (Continuing): He said that he should have those insurance policies changed and he would, but he didn't think there was any necessity to hurry about it because he had [59] the property settlement agreement signed by Genee.

Q. (By Mr. Joyce): Approximately when did that conversation take place?

A. That was about three months, I guess, after we were married; somewhere around there. I don't remember the exact date.

Q. That was when you and the doctor were living on Laguna Street, is that right?

A. Laguna.

Q. Were there any other conversations after your marriage?

(Testimony of Irene Carreiro.)

A. Yes, there was once, when we lived at 40 Cervantes. We had just moved there shortly.

Q. You had just moved there?

A. And we were furnishing our place there.

Q. Approximately when was that?

A. That was—I don't know if it was in the latter part of November or December.

Mr. Hearn: What year?

The Witness: Of December.

Mr. Hearn: The year?

The Witness: Of '53.

Mr. Hearn: '53?

The Witness: Yes.

Q. (By Mr. Joyce): That was just about two months before the doctor passed away? [60]

A. Yes, that was just when we had just moved in there and were furnishing our place.

Q. And what was said by the doctor at that time with reference to insurance?

A. We were—had been before that—planning to buy a place of our own, some flats, and we were going to live in one and rent one. But we decided to buy our furniture first. So one afternoon we were sitting admiring our things and my husband said, "We are more fortunate than most people who are married a second time." He said, "Your children are married and Phyllis has Peer to look after her," and he said, "There's only the two of us now," and he said that he should have that insurance changed, but he still didn't think there was any hurry because

(Testimony of Irene Carreiro.)

he had the property settlement agreement, preventing Genee from trying to take anything else.

Q. Now, by "Phyllis," who was he referring to?

A. Phyllis was the daughter of—his daughter.

Mr. Joyce: No further questions at this time, your Honor. [61]

* * *

PETER J. SACCHI

was called as a witness on behalf of the defendant Irene Carreiro, and having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows: [138]

* * *

Direct Examination

By Mr. Joyce:

Q. Mr. Sacchi, you are married to Mrs. Carreiro's daughter, are you not? A. Yes.

Q. Did you ever have any conversations with the late George Carreiro pertaining to his insurance?

A. Yes.

Q. When?

A. It was one afternoon, they were out at our house having dinner.

The Court: Fix the time.

Q. (By Mr. Joyce): Approximately what month?

A. Oh, I would say somewhere in September or October of 1953.

(Testi ony of Peter J. Sacchi.)

Q. 953? A. Yes.

Q. low do you fix that date in your mind? [139]

A. fix that date upon—I was about to be released rom the service and there was some doubt in my ind as to whether to carry my G. I. insurance t I had, and I spoke to the doctor about my insura e.

Q. Who else was at the house that day?

A. here was my wife and my mother-in-law.

Q. our wife is the daughter of Mrs. Irene Carreiro? A. Yes.

Q. Who was just on the witness stand?

A. nd Irene Carreiro was there along with the doctor.

Q. ow, this conversation you are talking about, who w present during the conversation?

A. Well, it was just the doctor and myself at the time w were discussing it.

Q. Whereabouts in the house did the conversation tak place?

A. h, it was somewhere near the telephone. We were si ting there and talking.

Q. n the living room?

A. n the living, yes.

Q. Was it before dinner or after dinner?

A. would say it might have been before dinner. I am n t too certain on it, that time.

Q. ow, what was said by Dr. Carreiro pertaining to h is insurance at this time? [140]

A. Well, I had mentioned the fact on my insurance th t I didn't know whether it was worthwhile

(Testimony of Peter J. Sacchi.)

keeping, being as it was just a life insurance that would never mature, and he says that it was a very good thing to have, because it would be a very good protection for my wife. Then he mentioned that he had several policies that he had for his wife, as a protection in case of death.

Q. Were you in the service at this time?

A. Yes, I was.

Q. How soon were you to be mustered out?

A. I was to be mustered out, well, I got out of the service in December. It was about 60 days, I guess, before I was to have been mustered out.

Q. Now, how did you happen to mention insurance to the doctor? What was the occasion of it?

A. Well, the occasion was that in order to keep your insurance, you had to go to the V.A. to sign papers for your insurance, that they carried for you at the time you are in the service. And I didn't know whether to keep them or not, and I spoke to him on it, being as that both my folks are not in the state. [141]

* * *

SHIRLEY SACCHI

was called as a witness on behalf of the defendant Irene Carreiro, and being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. Joyce:

Q. Your full name and address, please?

A. Shirley Sacchi.

The Court: Just a moment. How do you spell your name?

The Witness: S-h-i-r-l-e-y.

The Court: And where do you live?

A. 15253 Penn Avenue.

Q. Where? A. San Lorenzo.

Mr. Graham: Would you speak up, please?

The Witness: San Lorenzo. [142]

The Court: And your business or occupation?

A. I am a bank teller.

Q. And how long have you been so engaged?

A. Four years.

The Court: Four years. Take the witness.

Q. (By Mr. Joyce): Mrs. Sacchi, you are the husband of the gentleman who just testified?

A. No, I am the wife.

Q. Beg your pardon. You are the wife, the wife of the gentleman who just testified and the daughter of Mrs. Ireen Carreiro, who testified before him?

A. Yes.

Q. Now, you heard your husband's testimony just now? A. That's right.

(Testimony of Shirley Sacchi.)

Q. You were not present at this conversation, were you? A. No, I wasn't.

Q. Did your husband at any time after the Carreiro's left your home that day say that he did have a conversation with Dr. Carreiro?

Mr. Hearn: I object upon the grounds of hearsay, your Honor.

Mr. Joyce: There is no hearsay yet.

Mr. Hearn: It leads to another conversation.

Mr. Joyce: I haven't put in anything about another conversation.

Mr. Hearn: You just referred to another conversation. [143]

Mr. Joyce: Just that a conversation happened, your Honor. All I am going to ask this lady is, did her husband tell her that a conversation occurred.

Mr. Hearn: That is hearsay.

Mr. Joyce: It is not hearsay.

The Court: Just a moment. We are all getting nervous.

Mr. Joyce: Well, your Honor—pardon me, I am sorry.

The Court: Reframe your question so that I can pass on it.

Mr. Joyce: All right.

Mr. Joyce: Now, Mrs. Sacchi, I am not going to ask you to tell the Court anything that Mr. Sacchi—that your husband told you pertaining to what was said between himself and Dr. Carreiro; all I am asking you to tell the Court is, did your husband say to you that he had had a conversation with Dr. Carreiro pertaining to his insurance and Dr. Car-

(Testimony of Shirley Sacchi.)

reiro's insurance. A. Yes.

The Court: Just a moment. You can answer that question yes or no.

Q. (By Mr. Joyce): Now, what's your answer?

A. Yes.

Mr. Joyce: That's all I wanted to ask her.

The Court: Is that all, gentlemen? [144]

Mr. Graham: No questions.

Mr. Joyce: Thank you.

(Witness excused.) [145]

* * *

Mr. Hearn: Your Honor, I believe that all parties have rested and wish to submit the case to this honorable Court upon written memoranda of points and authorities. I further believe that there are pending motions relative to striking certain testimony; for the purpose of clarity I humbly suggest that perhaps we reduce these motions to written form and attach thereto, of course, our points and authorities in order that the mass of motions that are now pending may be simplified as much as possible.

The Court: Well, the way to do that is to keep right [337] on working, all get together, either here or in your office.

Mr. Hearn: Yes, your Honor.

The Court: And prepare and submit to the Court tomorow morning at 10 o'clock whatever you arrive at so that we will finally have a record here.

Mr. Smith: Yes, your Honor.

Mr. Kelly: In respect to the memorandum, may we have a ruling as to how many days we have for the memorandum of points and authorities?

The Court: You may not need any points and authorities, if you are familiar with the cases and you know the authorities you are going to cite; possibly you wanted to argue the matter tomorrow?

Mr. Joyce: I am in accord with that, your Honor.

Mr. Hearn: I have another case that will require my attention tomorrow, your Honor. I sincerely believe this case——

The Court: Where is your case?

Mr. Hearn: Over in Oakland, your Honor.

The Court: Well, we don't pay any attention to those Oakland courts. I want to give you full opportunity to present your case, gentlemen.

Mr. Kelly: I would suggest we have oral argument, but there are certain legal questions that should be briefed.

The Court: You have them available, haven't you? [338]

Mr. Kelly: Well, if your Honor would request it, just to submit them,——

The Court: I am requesting nothing. I am trying to help you gentlemen; that's all I am trying to do.

What's the best way to do it?

Mr. Hearn: Well, I think we might gain better continuity by having the motions simplified after we all agree on the phraseology thereof, and I think possibly if we have written points and authorities,

your Honor, it might be easier to peruse them and look over them at your convenience.

The Court: Five and five; would that be sufficient?

Mr. Hearn: It all depends on when the five starts, because we have New Year's and a holiday starting in here.

The Court: I will make it convenient before we get through, if I can. I have in mind, there are three approaches here to this problem.

Suppose you file a brief in five and then you can have another five days to answer your opponents.

Mr. Kelly: Each gets two shots?

The Court: Yes.

Mr. Smith: Five days from what date?

Mr. Hearn: From what date?

Mr. Smith: Five days from today, your Honor? That would be—— [339]

Mr. Hearn: That would be kind of rough.

The Court: I will give you a reasonable time.

Mr. Hearn: If we could have five days from Monday, it would be——

The Court: I am interested in time. I have some recollection of this thing now and I want to keep it in mind. I have half a dozen cases in chambers that I am working on, so I like to dispose of these as soon as I can. Maybe you gentlemen could dispose of it yourselves.

Mr. Hearn: We have attempted that, your Honor.

The Court: Well, let me say to you, I don't

want to shirk my duty, but I think in the interests of justice, there should be another effort made.

Mr. Hearn: Yes, your Honor, we will follow your instructions.

The Court: And that particularly has to do with you, Counsel. Can't you get these parties together?

Mr. Kelly: Well, it is a little difficult, your Honor, when the parties would like to exclude the bank in order to get together.

The Court: Well, what I mean by that, now that everybody has had an opportunity to have their day in court,——

Mr. Kelly: Well, there are certain testamentary——

The Court: What I have in mind here, somebody is going to be disappointed in what the Court may do. [340]

Mr. Kelly: That's correct.

The Court: I am going to try to do my duty as best I can, but that is just the beginning of this litigation and prolonging it, I don't think will inure to benefit of anyone.

Mr. Kelly: Your Honor, I would like to point out the difficulties in that. There are several unmentioned testamentary devisees or beneficiaries who aren't here, in the first place. I would have to get permission from Judge Fitzpatrick in order to compromise a claim, and——

The Court: I don't want you to think that I am inviting a compromise, but I do like to be helpful to everybody that comes in this court within reasonable limits, respecting the law and my own duty. I will dispose of this case the best I can.

Mr. Kelly: Well, we will certainly make every effort.

The Court: Do you know any reason why this case couldn't be settled?

Mr. Hearn: Your Honor, there is—I say this with all due respect to all counsel present, there is absolutely no reason, legally or factually, why this can't be amicably and equitably settled. It is just a matter of adjusting the figures.

The Court: What is your thought, Counsel?

Mr. Smith: We certainly would prefer to dispose of it [341] in that manner if possible. There again, we have the question of figures.

The Court: That's all right.

Mr. Graham: Judge, there is quite a point here.

Mr. Kelly: My position is strictly this, Judge; in all efforts of settlement, the bank has been judiciously excluded, and therefore I can't go along unless we are a party.

The Court: Oh, I understand you.

What's your thought?

Mr. Joyce: Your Honor, I have been in accord with the thought of settling this case from almost the very beginning.

The Court: Let's see. Now, unless you are all in accord wiht it, I am through encouraging that sort of thing. I don't want to shirk my own duty here. Everybody has put the best effort they could in this case for their clients. Suppose I give you five days with the hope that you can get together?

Mr. Hearn: Fine.

Mr. Kelly: And at that time a brief should be submitted?

The Court: No, no.

Mr. Hearn: No, we will explore the possibility of settlement for the next five days, Your Honor.

Mr. Kelly: I wish to state for the record [342] I will recommend any reasonable settlement to the bank for acceptance, but thus far no offer has been tendered to the bank.

The Court: What prompts me to do that is that during the course of this trial evidence discloses the parties in interest had a discussion in relation to a compromise. Am I correct in that?

Mr. Hearn: That's correct, Your Honor.

Mr. Smith: That's correct.

The Court: That is the only reason I have it in mind at all. However, now I give you five days, gentlemen, to do that, and that is if you are able to agree. If you are not, there is no use wasting time.

Mr. Smith: Well, I think by noon we came to somewhat of an agreement. Of course, as Mr. Kelly says, we have very studiously left the bank out.

The Court: What you can't agree on, you can give me the burden of making a determination on, if you wish.

Mr. Hearn: That's an idea, your Honor. I think that is a very excellent suggestion.

Mr. Kelly: I wish to point out, Your Honor, that if the bank isn't included, I cannot accept it.

The Court: What's that?

Mr. Kelly: If the bank is not included,——

The Court: I understand that. [343]

Mr. Hearn: Of course, Your Honor, we are

having an informal discussion at this time; our theory has been and my theory is, probably dogmatically, but with all due respect to Mr. Kelly, that the bank is a fiduciary means to an end, a transit to the clients whom we represent ultimately.

Mr. Kelly: There are other beneficiaries, though, Mr. Hearn.

Mr. Hearn: But those are other assets in the estate. You see, the policies——

The Court: In what way are their interests interfered with in the settlement in this case?

Mr. Smith: There are none, Your Honor; the only thing is that if in the end result, supposing that it were determined that the proceeds of these policies were to go to the estate rather than to our individual, respective clients, then the bank would be interested in it, as might be some of the legatees under the will. But it's only in that event.

Mr. Hearn: It is a remote factor, your Honor. The insurance policies provide for the payment to be made upon the death of Dr. Carreiro. That is established. The primary beneficiary is Mrs. Genee Carreiro, the first wife. The policy provides that if Mrs. Genee Carreiro is dead, then the proceeds go to Phyllis Baekgaard, the daughter of [344] the decedent. And then finally it provides that if the primary beneficiary is dead and the secondary beneficiary is dead, the proceeds go to the executor. That is why my theory is that the executor is one in theory only, really has no standing here, because it is a means to an end to get the money into the hands of the beneficiaries or the heirs of the estate.

The Court: I think that is correct, but we are dealing with a bank here, and I don't want to run counter to the wishes of a bank.

Mr. Hearn: I can appreciate that, Your Honor.

The Court: I think that is the thought. But I have been around here some time; I have seen these things presented from day to day and from year to year in courts. And while I can't control the situation, I know that we will waste a lot of time and energy and won't do the thing I would like to see done. This in a measure is an equitable proceeding. They come in here and seek to do equity between the parties in interest. I don't know of any better way than all you gentlemen disposing of your problem.

Mr. Kelly: Your Honor, I would like to comment on that to this extent, and that is this.

The Court: Mr. Reporter, I will silence you now. You will disregard notes on this. We are just discussing this matter, so no one is bound by any statement that may be made. [345] I don't want anybody to be bound by it.

(Discussion off the record between Court and counsel, not reported at the direction of the Court.)

The Court: What day will that bring us to, Mr.——

The Clerk: January 5th for further trial?

The Court: January 5th for further trial, and if I can help you in any way after you come in, I shall do it.

Mr. Smith: At what time, 10 o'clock, Your Honor?

The Court: 10 o'clock.

Mr. Smith: January 5th?

The Court: Is that agreeable, sir?

Mr. Graham: Judge, I am sure that our part of this case will be ably handled by our local associate. I want to thank Your Honor so much for bearing with me in the trial and I want to thank you for being a very fine person in whose court to be.

The Court: Thank you.

Mr. Graham: We will not be back, however. I have other cases, but it has been a great pleasure to be here.

The Court: Thank you. You may have a different opinion of me if they present this.

Mr. Graham: I assure you I shall not have, no matter what happens.

The Court: January 5th for further trial, [346] gentlemen.

Mr. Smith: I understand that is merely for the purpose of seeing whether or not we have got together?

The Court: Yes.

Mr. Smith: Thank you.

(Whereupon an adjournment was taken in the above entitled matter until the hour of 10 o'clock a.m., Wednesday, January 5, [347] 1955)

* * *

The Clerk: Mr. Joyce is not here, your Honor. He is ill and sent word this morning that he couldn't be here.

The Court: What will we do in his absence, gentlemen?

Mr. Hearn: This is the first I have heard about it, your Honor, but it is perfectly all right as far as I am concerned to have a continuance to accommodate Mr. Joyce.

The Court: Why isn't he here?

The Clerk: He is ill in bed, your Honor.

Mr. Kelly: I might point out, your Honor, that Mr. Joyce and I have agreed on our findings of fact and conclusions of law and I could speak for him, and to that effect.

Mr. Hearn: That is satisfactory. If the Court believes that under the circumstances Mr. Joyce and his client will be adequately protected even in his absence, it is certainly all right.

The Court: Well, he has two to represent, with you gentlemen. If that is agreeable to all the parties in [353] interest? What is left to be done, gentlemen?

Mr. Hearn: The findings of fact, your Honor; you requested counsel to prepare findings of fact and submit them to you. That is the first thing. And also, prior to that, your Honor, there is a motion pending relative to striking certain testimony. That motion related to all testimony concerning statements made by the decedent. The motion was predicated upon hearsay, upon the parol evidence rule

and upon the dead man's statute. That motion is still before this Court.

The Court: The motion will be granted.

Mr. Hearn: The other point, your Honor, related to the findings of fact and conclusions of law, and it is my understanding—I have just been served with copies and I have likewise submitted proposed findings, so I believe all parties have submitted proposed findings of fact and conclusions of law for your consideration. I believe that is the only point which is now before this Court.

The Court: Well, I expect counsel to help the Court. What about your findings?

Mr. Kelly: I have submitted my findings, your Honor,, and they are identical with Mr. Joyce's. I reviewed all the findings of the other parties and——

The Court: Where are those findings here? Now, I [354] read those findings this morning. I am prepared to sign these unless there is some objection, and I will hear any objections to them.

Mr. Hearn: Yes, your Honor.

Mr. Kelly: Which findings is your Honor prepared to sign?

The Court: I am prepared to sign your findings, but I want counsel to have an opportunity.

Mr. Hearn: Which findings do you have, your Honor?? There are three sets submitted.

Mr. Smith: Those are the intervener's, aren't they, your Honor?

Mr. Hearn: Who submitted those findings, your Honor??

The Court: Counsel (indicating).

Mr. Kelly: I did.

Mr. Hearn: Well, I haven't read them, but I would like a minute——

The Court: Have you got a copy, Counsel?

Mr. Smith: Yes.

The Court: Now, if there is no objection, I will hear you.

Mr. Smith: Well, I have submitted my own and I am sure the Court knows my feelings.

The Court: I read it, but I can't sign both of them.

Mr. Smith: Well, I realize that and I object simply [355] to them on the basis that they don't properly state the law in this case.

The Court: Well, I have in mind your client coming out from Chicago and her father being pretty good to her, and I don't know how a father could do more and how you can prevail under the circumstances here. I am at a loss to know how. I think I would be engaged in an idle act if it were otherwise.

However, I want to give you every opportunity to go forward if you wish in relation to the record, for I am not infallible, you know. I am one of those judges that——

Mr. Smith: Well, I realized, your Honor, that you heard all of the evidence and have in your own opinion decided the case as you feel is just and proper under the circumstances, and unfortunately, neither I nor my client nor my associate counsel in the case agree. I don't believe it is proper at this

time; as a matter of fact I am not prepared to argue points of law and I don't believe that it is applicable at this time.

Now, possibly before the Court does make its final decision and judgment in the case, your Honor would like to have——

The Court: Has judgment been prepared?

Mr. Hearn: Not yet, your Honor.

Mr. Smith: ——briefs submitted by the various parties. [356]

The Court: Why hasn't judgment been prepared?

Mr. Hearn: Well, as far as I am concerned, your Honor, I knew that there was going to be certain argument on these findings and I wanted to wait until the findings had been settled.

The Court: I will take a recess if you want to familiarize yourself further with the findings.

Mr. Hearn: No, I have the findings in my hand, your Honor. I have just read them now and there are certain matters here that I think are inconsistent with the record.

The Court: Very well, what are they?

Mr. Hearn: Your Honor, I first direct the Court's attention to Finding No. 16 and Finding No. 17.

The Court: Just a moment.

Mr. Hearn: On page 4.

The Court: Page 4? 16? (Reading.)

Well?

Mr. Hearn: Your Honor, the motion to strike all testimony relative to statements made by the

decedent was granted; therefore there is no evidence to support that finding.

Mr. Kelly: There was evidence from two sources, your Honor, stating their positions. Irene stated that it was her understanding that it was his intent.

The Court: Her understanding wouldn't sustain a [357] finding.

Mr. Kelly: However, I believe that counsel has a similar finding. If he wants to strike ours, it's going to be a jeopardy on his.

The Court: Are you going to offer findings?

Mr. Hearn: Yes, your Honor.

The Court: What is it?

Mr. Kelly: On Conclusion No. 2 on page 6 of these findings, it is identical with Mr. Hearn's conclusion, where it says:

> "At the date of death of George S. Carreiro he had manifested by conduct or otherwise an intention and desire to benefit four persons, namely, his first wife, Genee, his daughter, Phyllis Baekgaard, his second wife, Irene Carreiro, and his father, John J. Carreiro."

That is identical with Mr. Hearn's conclusion of law.

Mr. Hearn: That is a conclusion, that is different. Counsel doesn't distinguish between a conclusion of law and a finding of fact. My matter is entirely different, your Honor, because there are two factors of evidence before this Court relative to manifesting his conduct. One related to the execution of will six months before the property settle-

ment agreement was entered into, under the terms and provisions of which the entire estate with the [358] exception of one specific legacy was left to his first wife. Now, that is evidence, that is pleaded, the will is in evidence, the fact that it wasn't revoked and also proved because the will is in probate.

There was evidence relative to an act of the decedent in destroying his father's will, that the will was kept in the same place that the decedent's will was, so this Court has therefore competent evidence relevant to the fact that the decedent understood revocation by destruction. That is the first element of evidence from which this Court could conclude the decedent had manifested an intention.

The second is a letter which is in the record, which was testified to by a representative of the insurance company, wherein the insurance company acknowledged receipt of a copy of the agreement but stated also, if you wish to make any changes in the beneficiary arrangement, please advise and forms will be prepared for your signature.

The Court: You made that a part of your finding?

Mr. Hearn: Yes, your Honor. So I found that the letter had been sent, the letter had been received, the will had been executed, it had never been revoked, he had revoked his father's will after the execution of the property settlement agreement, and the father's will was kept in the same place as the decedent's will; so therefore we have competent evidence from which this Court could [359] conclude

as a matter of law that he had manifested one or another by conduct an intention to benefit four persons.

But to find as a finding of fact that on several occasions and prior to his death he expressed an intent, would be unsupported by evidence, because we have no evidence in the record relative to statements made by the decedent. All those statements were stricken. So I think, your Honor, predicated on that, Finding No. 16 and Finding No. 17 should go out because they are not supported by the evidence, any evidence.

The Court: The Court is prepared—is that all on those two findings?

Mr. Hearn: That is all I have on those two.

The Court: Let's dispose of them as we go along. I am prepared to strike both those.

Mr. Kelly: I am not going to argue against the Court on that.

The Court: All right.

Mr. Kelly: I cannot speak for Mr. Joyce in respect to 16 or for Mr. Smith in respect to 17. However, I concede that the Court is correct as far as the bank is concerned.

Mr. Hearn: There are additional findings of fact, your Honor, that might add—that could be added. Those were suggested in my proposed findings of fact. [360]

The Court: What are they?

Mr. Hearn: One that I had in my proposed findings of fact.

The Court: Mr. Clerk, where is it?

The Clerk: Right here.

The Court: Page?

Mr. Hearn: On page 2, Finding 7.

The Court: (Reading below audible level.)

Mr. Hearn: I see, your Honor, incidentally, that that has been covered by seven of the other findings, so that's all right.

Now, there's another finding, however, that I think should be here, Finding No. 15 on page 4. That was testified to by a representative of the insurance company.

The Court: Well, what——

Mr. Smith: Did you say 15?

The Court: 15?

Mr. Hearn: On page 4.

The Court: 15?

Mr. Hearn: Yes, your Honor.

The Court (Reading): That was by letter, wasn't it, too?

Mr. Hearn: Yes, your Honor, that related to this letter.

Mr. Kelly: Which finding? This is the latest ones? [361] You prepared two of them, Counsel. I am a little confused.

Mr. Hearn: No, this is the one I sent to you, the second proposed findings that I sent to you.

The Court: If that had to do with that correspondence, there was no answer to it, was there?

Mr. Hearn: That's correct, your Honor. We had the representative of the insurance company bring her files into court and testify that there was no communication in there received as a response to this letter. [361-A]

Mr. Kelly: Your Honor, I submit that that whole testimony there had to do with conversation with the decedent, which is stricken also. Whether it is conversation orally or conversation by lack of saying anything, it is.

Mr. Smith: He had no conversations whatsoever with the decedent.

Mr. Kelly: That is my recollection also.

Mr. Hearn: No, this relates to a transaction, your Honor; there is evidence in the record relating to a transaction between the assured and the insurance company. The record shows that upon several occasions he borrowed money from the insurance company before he executed the property settlement agreement. The record shows that in so borrowing money he signed change of beneficiary forms. The record shows that he then sent the property settlement agreement to the company and by letter they acknowledged it and told him that he had to sign change of beneficiary forms, and that thereafter Miss Stuart testified that the decedent was in the office of the insurance company to get the cash on loan. so that's evidence, and we want to show that he was in the office transacting business.

The Court: That is my understanding.

Mr. Hearn: Subsequent to the date of this letter. But at no time did he sign or request any change of beneficiary form. [362]

Mr. Kelly: Your Honor, I am going to object to that on this ground. In the first place, that is a conclusion saying that he had opportunity to do it. We don't know what was in the man's mind. See-

ondly, in this letter they say, "We wish to thank you for forwarding to us a certified copy of the property settlement agreement between you and Mrs. Carreiro. The agreement will be attached to the permanent records at the home office and we can now consider that Mrs. Carreiro had no further community property interest in these policies." Counsel emphasized the fact that the second paragraph, "If you wish to make any change in the beneficiary arrangements, please advise." The first paragraph, though, says, "We can now consider that Mrs. Carreiro has no further community property interest in these policies."

Mr. Carreiro is a lay man and I think it can just as easily be concluded that he felt that that wound up the thing once and for all, and the testimony of other witnesses substantiates that.

Now to put in an opinion here that he had ample opportunity—all it is is an opinion, not substantiated by any fact, and it can't be taken as a fact.

Mr. Hearn: One is a conclusion of law; that is a fact. He was in the office, he obviously had a chance to sign a change of beneficiary form if he was in the office.

Mr. Kelly: That isn't a fact. [363]

Mr. Smith: That is a conclusion.

Mr. Kelly: That is an opinion and conclusion.

The Court: If my recollection is correct, that finding conforms to—there's evidence in the record to respond to that finding.

Mr. Hearn: That's correct, your Honor. Mrs.

Stuart so testified—the secretary of the insurance company.

Mr. Smith: Well, if the Court please, on that I think the objection is not to the whole paragraph, it is as to this statement commenting——

The Court: The language about the opportunity.

Mr. Kelly: Yes.

The Court: You can strike that out.

Mr. Smith: Subsequent to the date he had ample opportunity?

Mr. Hearn: I will strike that, your Honor.

Mr. Smith: We have no dispute whatsoever that he was in the insurance company's office on other business.

Mr. Hearn: We can strike the sentence at, "subsequent to the date of said written communication George S. Carreiro had ample opportunity to effect a change in the beneficiary arrangement of the aforesaid policies by signing any appropriate forms relating thereto." But we can leave in, "but at no time did George Carreiro request a change of beneficiary." I think I can change this, your Honor, to [364] state that upon several occasions subsequent to the receipt of this letter Dr. Carreiro was in the office of the insurance company. That's the testimony.

The Court: That is the testimony.

Mr. Kelly: Your Honor, I don't want to belabor this point, but there is this to be said. I think the evidence showed that Dr. Carreiro effectively felt that he had changed that beneficiary policy by send-

ing in this property settlement agreement to the insurance company.

The Court: I think his state of mind, from what I got from the testimony, was, he wanted to be helpful to everybody. I don't know the man and never had occasion to know him, but from the evidence I hear, it could be concluded sort of generally that he was the type that wanted to please everybody that he had any contact with.

Mr. Smith: Well, if the Court please, may I respectfully suggest in that respect that you have just granted the motion to strike all testimony of all parties.

The Court: If only hearsay, only hearsay testimony. Now if you want——

Mr. Smith: That was not the understanding, nor my understanding of your ruling on that. As I recall it, the motion was to strike all the testimony brought by all parties, all testimony respecting conversations which they had with the doctor as evidencing intent. [365]

Mr. Kelly: That was my understanding, your Honor, of your ruling.

The Court: No, I didn't go that far.

Mr. Kelly: Well, if that is the case, then that conclusion on Irene is still good, because that was a conversation with Irene; just the same as this conversation with this insurance lady was a conversation with her, with the doctor.

Mr. Smith: See, the effect of that, your Honor, is to——

The Court: Well, I want to give both sides an

opportunity. This is a family affair, and while technically there's exceptions, of course, to the hearsay rule, unless we have the testimony from the record—I was trying to deal with it generally. We were on both sides. I let both sides' testimony in, as far as I am concerned.

Mr. Smith: I would say, your Honor, that 99 per cent of the testimony that went in here was all hearsay.

The Court: That's what I had in mind.

Mr. Smith: Except as to the conversations that the respective litigants had between themselves. And the effect of your ruling is to strike all of that testimony except as to what the daughter said to her mother and the mother said to the step-mother, and so on and so forth.

Mr. Hearn: It is still sufficient, your Honor. We have a case involving insurance policies with designated [366] beneficiaries, a property settlement agreement, a letter from the insurance company to the effect—to the decedent, and transactions after that. So there is enough evidence before the Court to show possibly his intent. We have a will, we have the failure to revoke a will. So we have conduct and no hearsay.

I think the Court's conclusions can be predicated upon the evidence which is in the record exclusive of any hearsay, because by conduct he did certain things. He failed to revoke a will; that is an act. And in that will he designated his father as one of the beneficiaries and his first wife as a second beneficiary. By conduct, he married his second wife.

By conduct, he indicated in a property settlement agreement a release to his first wife, and vice versa. By conduct, he had indicated the name of a person in a will, his daughter, and in the insurance policy.

So, excluding all hearsay, we have competent evidence relative to the affections of a man toward four people: his first wife, his second wife, his daughter, and his father. So I think that this Court can decide the case, as it has done, on the competent evidence that's before it and excluding all hearsay concerning statements made by the doctor to anybody.

Mr. Kelly: Your Honor, by one amendment I am willing to go along with this thing. I think it would be the simple [367] way out. Where he says, "but at no time did George S. Carreiro request a change of beneficiary of the aforesaid policy," I would go along this way: "but at no time did George S. Carreiro request a change of beneficiary other than in forwarding to the insurance company," or words to that effect, "a copy of the property settlement as aforesaid."

Mr. Hearn: Well, it's modified by the letter. I mean, that is a conclusion.

Mr. Kelly: But it makes it look awfully strong that at no time did he ever request a change of beneficiary, and I feel that he himself felt that way, and I would be willing to accept this with that modification.

Mr. Hearn: But we asked Miss Stuart of the insurance company whether at any time Dr. Carreiro

had requested a change of beneficiary, and her answer was no.

Mr. Kelly: You are talking about conduct all the time, Counsel. Now, there's conduct where he sent in a——

Mr. Hearn: But I mean a request, a written or verbal request. That is a business transaction and that I think we are entitled to.

Mr. Smith: Well, as I recall, there is no evidence before the Court as to just what steps he had to take to make a change of beneficiary.

Mr. Hearn: The letter. If you wish to make any changes—it says, " if you wish to make any changes, please advise [368] and forms will be prepared for your signature."

Mr. Smith: But they didn't say that was the only way.

The Court: Your position might be correct if he had an attorney with him there to advise him.

Mr. Hearn: Yes, well, the evidence showed and the policies show, your Honor, that there are exhibits attached to the policies showing he had signed change of beneficiary forms before this divorce incident to obtain loans. So he understood.

Now, again, as far as having a lawyer, true, it is a lay mind; but I have a finding in here that he was a member of Phi Beta Kappa. That was established by testimony.

Mr. Smith: If the Court please, that finding is entirely hearsay.

The Court: What is it?

Mr. Smith: That finding that George S. Carreiro

was a member of Phi Beta Kappa—frankly, I don't know what bearing it has on the case except to show that he made some good marks while he was going to school.

Mr. Hearn: He could read a letter.

The Court: Personally I wouldn't make any distinction there whether he belong to the Ancient Order of Hibernians or the Phi Beta Kappa.

Mr. Hearn: Well, the implication is, if a man receives a letter which states clearly what he has to do, and if he [369] capable of earning the grades necessary to be a Phi Beta Kappa, he could read the letter.

The Court: Well, maybe he polished the apple for the professors or something.

Mr. Smith: That's correct. In any event, your Honor that particular finding, which happens to be No. 1——

The Court: Well, I have to strike that.

Mr. Smith: We ask it be stricken.

Mr. Hearn: All right, that can go out. I won't argue about it. There's another point, your Honor.

Mr. Kelly: I would like to answer that last one.

Mr. Hearn: All right.

Mr. Kelly: Your Honor, you will recall at the hearing after the lady from the insurance company spoke I moved to strike her testimony and with cases supporting it, on the basis, and this is the law and I can support it, that once an insurance company has deposited or interpleaded the policies in a federal court, it waives all rights and defenses as to the form and method of changing beneficiary.

So actually any right that she had or the insurance company had to change beneficiaries, they couldn't even assert them.

Mr. Hearn: That is not the point.

Mr. Kelly: It is immaterial what the methods were of changing it. The big point was whether or not the doctor felt that he had changed it. So if that thing could be [370] modified with that inclusion, other than in forwarding the property settlement to the insurance company, I think that would be the satisfactory solution to it.

Mr. Smith: May I suggest this, your Honor? We have now gotten back into points of law again and cases supporting contentions on motions. I would like to respectfully suggest again that briefs be submitted on this matter. I would like to point this out briefly to the Court, probably the Court is familiar with it, that there has been an extreme amount of litigation in California concerning the effect of property settlement agreements as to whether, as I will designate here, the ex-wife, being retained on the insurance policy as named beneficiary—as to whether or not she is still entitled to the proceeds of that policy. Then again we come to the next point——

The Court: Pardon me just a moment. Your legal position is a correct one. We are facing a problem here where the parties in interest indicated an attitude that they wanted to get together to settle their difficulties. Am I correct in that?

Mr. Hearn: That's correct, your Honor.

The Court: Now, then, I approach it from that

viewpoint. Now, all of the parties in interest have been represented by attorneys here and they are closer to their problem than I am, because I didn't check your law cases in [371] the light of the problem presented. But after hearing the testimony, I still am of the opinion that we are doing the best thing we can under all the circumstances here, keeping in mind the parties in interest and all. That is my honest opinion.

Mr. Smith: Well, my only reason for making this suggestion last time——

The Court: I think that, so far as I am concerned, I would give you any time you wanted to do whatever you wish. And I will leave the record stand on both sides with relation to hearsay testimony and in relation to the state of mind of the parties, as far as I am concerned.

Mr. Smith: Well, my only reason for renewing that suggestion, your Honor, was, in view of Mr. Kelly's statement in raising an objection here to one of the findings.

The Court: He is willing to modify the findings to conform to your wishes.

Mr. Kelly: Certainly. I want to be reasonable. I think some of Mr. Hearn's suggestions are very good, and we are not very far apart. I think it is just a matter of another half hour and we will have this whole thing settled.

The Court: I am going to recess and get down so that no matter what's done, we have done the best we can under [372] the circumstances here. The

way we approach the problem, and I want to try and—were you offered anything in relation to your clients, in relation to this settlement?

Mr. Smith: Never anything definite, your Honor.

The Court: Well, that's what I started out to do, for I wanted to take care of all the parties.

Mr. Smith: During the course of the trial we had offers from one counsel or two, but the third one said, "Absolutely no." And I will be frank with the Court, we attempted to dispose of this matter, I think, on that equitable basis long before we got involved in a lot of the subsequent litigation. I mean, the original suit had already been filed in court here, and at that time Mr. Kelly, the Intervener, came in and we attempted to make some disposition, in which there were two of us in substantial agreement as to the equitable rights of the parties, but the third one——

The Court: Were you it?

Mr. Hearn: I don't know, your Honor. I naturally become incensed when somebody comes up to me and says a woman who has been married to a man for 25 years has no rights, she is out. The daughter wanted to take the lion's share. In my experience in equity, whenever there are four parties, with the love and affection of a person between them, it seems to me it is a matter of mathematics, equal [373] division, and I have studied the law on this subject and I take strong exception to Mr. Smith's assertions, because I feel just as dogmatically as he does that this first wife is actually the

designated beneficiary and her rights would be upheld in a court. But I also feel that justice and equity are entirely different from harsh rules of law.

The Court: The stubbornness on both sides being relaxed, is there any hope of disposing of the matter on an equitable basis?

Mr. Hearn: Your Honor, I feel that the stipulation that we entered into on dividing it between four people equally is the most equitable division that would be possible.

Mr. Kelly: I join in that, and of course Mr. Joyce.

Mr. Hearn: For example, your Honor, there was purportedly $31,000. I suggested $7,500 to each. Mr. Smith's suggestion was, the daughter take $20,000, leaving the others $10,000 or $11,000 between three people, or $3,500 for each of the others and twenty-five for the daughter.

The Court: I don't want to be too severe with you, but you weren't in an equitable state of mind when you made that.

Mr. Smith: That, your Honor, was—let's see. We started trial on Tuesday and we tried it through Wednesday [374] and that was Wednesday night. Now, may I say this?

The Court: I am in the hands of the younger advocates, but as I grow older I get more mellow every day, and I am going to take a recess with the hope that maybe now that we have exhausted ourselves otherwise, that maybe we will make a final conclusion of this case. I know that you gentlemen are capable of doing that.

Mr. Kelly: I am sure we are, your Honor.

Mr. Smith: Well, may I——

The Court: I have a marshal here that, if you don't behave, why, he will take care of you! I am going to take a recess.

Mr. Smith: May I ask the Court a question? Whether it is advisory in some respects, since my findings of fact and conclusions of law are apparently all contra to the other three which were submitted, is it necessary that I enter into any present objections for ironing out the findings of fact and conclusions of law which you indicated?

The Court: I don't want you to waive any legal rights you may in conscience think you have. There is no mystery about what we are trying to do here at all.

Mr. Smith: Because actually——

The Court: In my mind.

Mr. Smith: There are very few of them that I can agree to. There are certain findings of fact and conclusions, [375] obviously, I can't agree to.

The Court: All right. Now then, I can take a step further with you. I will sustain findings that will support this judgment before I finally get through on a legal basis, there will be no doubt about that, so that we will take a recess now and you can enter into the equity side of the matter insofar as you can.

Mr. Smith: May I—well, perhaps we should take the recess, Judge.

(Recess.)

Mr. Kelly: May it please the Court, Mr. Smith has reserved his objections, Mr. Hearn and I have agreed as previously indicated that the Court would sign the findings of fact and conclusions of law prepared by the Intervener.

Now we will draw up a new set of findings of fact, but for the record I wish to state how it would be.

The preamble of Interveners would be the same. Paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 are the same. 16 and 17 will be stricken, and pursuant to the order of the Court. 18 and 19 the same. 20, 21, 22, and following 22 we will now insert counsel for Genee Carreiro's 15 as modified, to read, that, "subsequent to the date of the aforesaid written communication George S. Carreiro had transactions with the aforesaid representative of the insurance company wherein his personal presence at [376] the office of said insurance company was required, but at no time did George S. Carreiro, other than by forwarding the aforesaid property settlement agreement to said insurance company, request a change of beneficiary of the aforesaid policies or make any efforts in regard to compliance with the requirements of the aforesaid insurance company in regard to change of beneficiary procedure."

Following that we will insert Mr. Hearn's proposed Finding No. 16. Following that Mr. Hearn's proposed Finding No. 19 and following that Mr. Hearn's proposed Finding No. 20. Then Intervener's 23, 24, and all of Intervener's conclusions

of law as stated, and with that in mind we will submit that to the Court. [377]

The Court: A week?

Mr. Hearn: Yes, your Honor.

The Court: One week.

Mr. Kelly: Let me check that.

Mr. Hearn: What we can do to simplify this, your Honor, is, we will submit the proposed findings of fact and conclusions of law with a stipulation attached thereto signed by counsel for the first wife, counsel for the second wife and counsel for the executor that the findings and conclusions as therein set forth can be signed by this Court.

The Court: Very well.

Mr. Hearn: And the proposed judgment also, so we really don't need a hearing on that.

Mr. Smith: Are you going to hand in the judgment at that time?

Mr. Hearn: Yes, we will serve and——

Mr. Smith: In connection with that, your Honor, if it is intended that the judgment be signed, I am going to ask for a ten-day stay of execution on the judgment for obvious purposes.

The Court: Very well.

Mr. Kelly: Your Honor, I have a petition with the Superior Court of San Francisco to approve this compromise set for the 15th. I would like this to be for the 16th, [378] because I anticipate that approval.

The Court: Agreeable?

Mr. Smith: As far as I know, your Honor.

The Court: The 16th?

Mr. Hearn: Now, there are two other matters, your Honor. The policies were pleaded and duplicate original policies have been prepared by the company and made available for us. They are in the possession of the clerk and I would like for the purposes of the record to move that they be introduced in evidence.

The Court: Let the record so show.

Mr. Hearn: So they will be part of the record.

There is one further point, your Honor. Heretofore it was directed to this Court's attention that an additional insurance policy existed. That was a Prudential policy. This Court made its order directing the deposit of the insurance policy with the clerk of the court, and following the same procedure. Now, I communicated with counsel for the Prudential Insurance Company and counsel indicated hesitance about complying with this order and stated that in their opinion the company wouldn't be adequately protected unless a bond for about 20 years be executed and submitted. Well, the bond would be rather expensive and I believe that procedurally, inasmuch as they hesitate to comply with this order, it may be proper to amend the pleadings to [379] bring in the Prudential as a party defendant and then serve upon them this order.

The Court: Bring them in, serve them so they will be here next time.

Mr. Hearn: So I now move we have permission to forthwith amend all pleadings to designate the

Prudential Insurance Company as a party defendant.

Mr. Kelly: I join in that.

Mr. Smith: I will join in that. In that connection, your Honor, there is one more thing. In connection with bringing them in as a defendant, I believe it's said that it is discretionary with the Court that they can be awarded attorneys' fees from the proceeds, and I believe in this instance, since they have had an opportunity to place the funds into court without any work whatsoever on their part, Mr. Hearn, I understand, drafted the original order which the Court signed, that they should not be awarded any attorneys' fees or costs if they so petition.

The Court: Suppose they don't want any, do they?

Mr. Smith: No, they don't want it.

Mr. Kelly: They don't want the policies in, you mean.

Mr. Smith: Nor the proceeds.

Mr. Kelly: The Judge is saying they don't want any fees.

Mr. Smith: Oh, I thought he said they don't want it [380] in.

Mr. Kelly: You have got to be a little quicker than that. This Hibernia Club.

(Laughter.)

Mr. Smith: I assume that since they are working for a living, that they probably will ask for fees.

The Court: Well, I am sure if they do, it will be reasonable.

Mr. Smith: Well, personally I don't feel that they should be entitled to any under the circumstances.

The Court: Well, if they are not entitled to any, I am sure they won't ask for them.

Mr. Smith: Well, we can take that matter up if it comes.

The Court: All right, settle that between yourselves.

Mr. Hearn: Thank you. If I may, then, I will send in the order permitting the amendment of the pleadings. We will get them served right away with the other order that is made.

Very well, that will go over to Wednesday, the 16th, and we will try to conclude with all matters so you won't be——

Mr. Kelly: There won't be any problems by Wednesday.

The Clerk: Defendant's Exhibit G-6, G-7, and G-8 admitted and filed in evidence.

(Whereupon insurance policies referred to above [381] were received into evidence and marked as Defendant's Exhibits G-6, G-7, and G-8, respectively.)

(Whereupon an adjournment was taken in the above-entitled action until Wednesday, February 16, 1955.) [381-A]

Wednesday, February 16, 1955

The Clerk: New England Mutual Life Insurance Company versus Carreiro, et al., settlement of findings.

Mr. Hearn: That is ready. Your Honor, we have reached an agreement among three of us for findings of fact and conclusions of law. I have not had an opportunity to have them sign the original and approve the form, but they will do so.

Mr. Smith, who is the attorney for the daughter Phylis Baekgaard, has asked me as a matter of courtesy would I make a motion for a stay of executionat this time, which I do, although I do not join in the motion; I do it as a matter of courtesy to a brother counsel.

The Court: In substance, what do we find here? Is this the final determination of this matter?

Mr. Hearn: Yes. You will recall that you were going to indicate that you would sign my findings of factand conclusions of law. There were some objectons, but we have ironed out the objections betwen counsel.

The Court: Today is February——

Mr. Hearn: The 16th.

The Court: Other counsel are not here, but you will see to it that they sign it?

Mr. Hearn: I will, yes. [382]

The Court: All right.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 382 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ ELDON N. RICH.

[Endorsed]: Filed April 21, 1955. [382-A]

EXCERPTS OF PROCEEDINGS ON TRIAL

Thursday, January 6, 1955
Friday, January 14, 1955

* * *

This is an equitable proceeding. There is a certain sum involved. It would appear, therefore, in my humble opinion, equitable to simply divide the $31,000 by four. The division would result in each of the persons before this Court receiving approximately $7,650. The $7,650 that would be payable to the executor would, of course be subjected to certain costs and fees, but I believe it would result in a net of $5,000 payable therefrom, paid to the father of the insured, the father of the decedent, to whom he left a $5,000 bequest. Therefore, it would appear that with that [2*] division effected, all persons whom the decedent and assured had in mind, whether by way of will or marital status or insurance contracts, would participate in this fund.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Now, we met several times and conferred concerning this matter, your Honor, and counsel for the second wife has agreed to that, is that not correct?

Mr. Joyce: I have.

Mr. Hearn: And counsel for the executor has agreed to that, is that not correct?

Mr. Kelly: That is correct.

Mr. Hearn: And I am counsel for the first wife and I have agreed to that.

Counsel for the daughter has disagreed and will indicate to this Court wherein he disagrees. [3]

* * *

The Court: Is there anything further you wish to say, counsel?

Mr. Smith: No.

The Court: Now, isn't your client taken care of properly under the suggested settlement?

Mr. Smith: Well, I think it has been pointed out to the Court, apparently it is a matter of difference of opinion as to the construction and legal interpretation, the legal effect of certain documents which were executed and filed. I will agree as far as the equities of the situation that undoubtedly Irene, who is the second wife, is entitled to consideration. As far as the first wife, I have always maintained this, and will, that she is entitled to no consideration in this matter.

The Court: I don't fully agree with you on that.

Mr. Smith: Well, that is apparently——

The Court: I am just pointing the situation up and giving you my thought on the matter. Will you

be protecting your legal rights in the event the Court enters a judgment as suggested here? You haven't lost any of your legal rights, you can go forward?

Mr. Smith: Well, I am assuming that I will be free to pursue——

The Court: Certainly.

Mr. Smith: ——whatever legal remedies there are. [9]

The Court: That is why I am inquiring.

Mr. Smith: That is why I said I would like it to get to the decision of this Court, and if my client in the end result is satisfied, we will drop it there. If not, why, I can only abide by the wishes of my client.

The Court: Well, then, I will hear suggestions in relation to preparing the judgment and findings in this case in accordance with the suggestion of the three that are in accord.

How will we approach that, gentlemen?

Mr. Hearn: Your Honor, if I may suggest that point, without having done any research in regard to it, it is my recollection that in an equitable proceeding where funds are deposited in court, it is within the province of the Court to construe the intention, as this case poses the point, or the lack of intention or the lack of the manifestation of intention. I think that the findings could specifically spell out the apparent confusion, if that is our theory, in regards to the testator and insured and his manifested wish, exemplified by certain actions and statements regarding four people who were close to him and dear to him. It could further find

that in order to do justice and equity in accordance with the powers of this Court, that the interests of justice would best be served and the intention of the testator and insured carried out by an equal division between [10] those four and then judgment could follow accordingly.

The Court: Anything further?

Mr. Smith: I have no suggestions in that respect, your Honor.

Mr. Kelly: I would suggest, your Honor, that we collaborate in preparing——

The Court: I am going to give you time on the calendar so you can serve counsel.

Mr. Kelly: And if counsel wishes to object to them, he can.

The Court: Certainly. How long will it take you to do that, gentlemen?

Mr. Hearn: Five days, your Honor?

The Court: Is that agreeable to you all?

Put the matter on the calendar for a week for that purpose.

Mr. Hearn: A week from today.

Mr. Smith: Tentatively, if it please the Court, so I may check my calendar. If not, I assume that if we agree, we may have a continuance?

The Court: Whatever day is agreeable to you.

Mr. Smith: Yes. In that, in respect to this, your Honor, I believe there were some motions before the Court which have not been decided. As I recall, was it two weeks last Wednesday, at the conclusion of the trial of this matter, those motions were to be

held in abeyance. I believe [11] the gist of all of the motions was to strike. I assume it was to strike all of the testimony of all witnesses for various reasons—violation of parol evidence rule, so on and so forth.

The Court: You can prepare a motion and present it when the matter comes up. I will help you clear up the record.

Mr. Smith: I was just wondering if that possibly shouldn't be straightened out before the case goes to decision or before judgment is rendered.

The Court: You make a general statement. I don't know what the objections were.

Mr. Kelly: Your Honor, I believe that was my motion to strike, and in light of the developments, preparing findings, I reserve the right to withdraw that motion.

The Court: So that your record may be protected, you can prepare a motion so it may be filed and put on for the record, and I will act on your motion.

Mr. Smith: It wasn't my motion. I mean, it was directed to me.

The Court: What's that?

Mr. Smith: It was not my motion, your Honor; it was directed to testimony put on by myself, Mr. Hearn and Mr. Joyce. I feel the record should be——

The Court: If you want a record on it and you want a ruling on it, why, I will rule on it when you make up your [12] motion, if that is what you have in mind.

Mr. Smith: I feel that the motion should be decided one way or the other.

The Court: All right, I will give you a record.

Mr. Smith: If Mr. Kelly wants to withdraw it, why, well and good.

Mr. Kelly: I will consider that on the day of our findings, a week from today.

Mr. Smith: All right.

The Court: Very well, over one week, gentlemen.

Mr. Hearn: Thank you, your Honor.

The Clerk: January 21st.

Certificate of Reporter

I, Official Reporter and Official Reporter pro tem, certify that the foregoing transcript of 13 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ ELDON N. RICH.

[Endorsed]: Filed May 6, 1955. [13]

PLAINTIFF'S EXHIBIT B

In the Superior Court of the State of California in and for the City and County of San Francisco

No. 409472

Department No. .....

GENEE M. CARREIRO,

Plaintiff,

vs.

GEORGE S. CARREIRO,

Defendant.

INTERLOCUTORY JUDGMENT OF DIVORCE

This cause came on regularly for trial on the 21st day of August, 1951, upon plaintiff's complaint taken as confessed by the defendant, whose default for not answering, after having been regularly served with summons, has been duly entered, and upon the proof taken it appears, and the Court finds, that all the allegations of the complaint are true and are sustained by evidence free from all legal exceptions, and from which the Court finds and determines that a divorce ought to be granted upon the ground of defendant's extreme cruelty.

Wherefore, it is hereby Ordered, Adjudged and Decreed that plaintiff is entitled to a divorce from defendant and that, upon the expiration of one year from the entry of this judgment, a final judgment be entered herein granting said divorce and restoring said parties to the status of single persons.

It is further ordered, adjudged and decreed that the property settlement agreement dated August 7, 1951, heretofore entered into between the parties hereto and attachd to this judgmnt be and is hereby approved and made a part of this judgment.

Done in Open Court this 21st day of August, 1951.

/s/ THERESA MEIKLE,
Judge of the Superior Court.

Notice—Read Carefully—This is Not a Judgment of Divorce. The parties are still husband and wife and will be until a final judgment of divorce is entered. This can not be done until one year after the entry of this interlocutory judgment and decree. Final judgment of divorce will not be granted unless requested by one of the parties. A marriage anywhere before a Final judgment of divorce is entered is illegal.

Interlocutory Judgment of Divorce

PROPERTY SETTLEMENT AGREEMENT

This agreement made and executed in duplicate this 7th day of August, 1951, by and between George S. Carreiro, hereinafter referred to as the husband, and Genee M. Carreiro, hereinafter referred to as the wife, both of the City and County of San Francisco, State of California,

Witnesseth:

Whereas, the parties hereto are now, and for some time past have been, husband and wife; and

Whereas, the parties hereto are now, and for some time past have been, living separate and apart; and

Whereas, prior hereto certain domestic difficulties and indifferences have arisen between the parties hereto, as a result of which the parties hereto have separated and ceased living together as husband and wife; and

Whereas, the parties hereto are minded to forever adjust and settle any and all community rights, property rights, rights to support or maintenance, and other matters between them;

Now, therefore, it is agreed that in consideration of the mutual promises, agreements and covenants contained herein, it is covenanted, agreed and promised by each party hereto, to and with the other party hereto, as follows:

First: That, except as hereinafter specified, each party hereto is hereby released and absolved from any and all obligations and liabilities for the future acts and duties of the other, and that each of said parties hereby releases the other from any and all liabilities, debts, or obligations of any kind or character incurred by the other from and after this date, and from any and all claims and demands, including all claims of either party upon the other for support and maintenance as wife or husband or otherwise; it being understood that this instrument is intended to settle the rights of the parties hereto in all respects, except as hereinafter provided.

Second: That any and all property acquired by either of the parties hereto from and after the date hereof, shall be the sole and separate property of the one so acquiring the same, and each of said parties hereto respectively grants to the other all such future acquisitions of property as the sole and separate property of the one so acquiring the same.

Third: That each of said parties shall have an immediate right to dispose of or bequeath by will his or her respective interests in and to any and all property belonging to him or her from and after the date hereof, and that said right shall extend to all of the aforesaid future acquisitions of property as well as to all property set over by either party hereto under this agreement.

Fourth: That said parties hereto each hereby waive any and all right to the estate of the other left at his or her death and forever quitclaim any and all right to share in the same of the other, by the laws of succession, and said parties hereby release one to the other all right to be admiinstrator or administratrix or executor or executrix of the estate of the other, and hereby release and waive all right to inherit under any will of the other, and each of the said parties hereby waive any and all right of homestead in the real property of the other, probate or otherwise, and said parties hereby waive any and all right to the estate or any interest in the estate of the other for family allowance by way of inheritance, and from the date of this agreement to the end of the world said waiver of the other in the

estate of the other party shall from the date of this agreement be effective and they shall have all the rights of single persons and maintain the same relation of such toward each other.

Fifth: The husband and wife shall accept the provisions herein made for each of them in full satisfaction of the right of either to the community property or alleged separate property of either of them.

Sixth: The property of the parties hereto shall be divided by said parties as follows:

1. The wife shall receive and be entitled to all that real property situated in the City and County of San Francisco, State of California, described as follows:

> Beginning at a point on the westerly line of Le Roy Street, distant thereon 70 feet and 6 inches southerly from the southerly line of Sacramento Street; and running thence southerly along said line of Le Roy Street 46 feet; thence at a right angle westerly 58 feet and 9 inches; thence at a right angle northerly 46 feet; and thence at a right angle easterly 58 feet and 9 inches to the point of beginning.
>
> Being part of 50 Vera Block No. 247.

2. The wife shall receive and be entitled to all the household furniture, furnishings, and all other personal property of every kind and nature in or used at No. 4 Rossi Avenue, San Francisco, Cali-

fornia, free and clear of any claims of the husband thereto.

3. The wife shall receive and be entitled to all that corporate stock now standing of record in her own name in Shemano Hair & Scalp Method, Inc., free and clear of any claims of the husband thereto.

4. The wife shall receive and be entitled to that 1949 model Plymouth Special Deluxe Club Coupe automobile bearing Serial No. 25078222, free and clear of any claims of the husband thereto.

5. The wife shall receive from the husband and the husband promises and agrees to pay to the wife the sum of $150.00 per month as and for the support and maintenance of the wife, beginning with the date hereof, for the period of one year only.

6. The husband shall receive and be entitled to his dental offices located at No. 490 Post Street, San Francisco, California, all the equipment therein, accounts receivable, and all other property pertaining thereto, free and clear of any claims of the wife thereto.

7. The husband shall receive and be entitled to the insurance policies hereinafter listed, free and clear of any claims of the wife thereto.

Policy No. 820167 in the sum of $10,000.00, New England Mutual Life Insurance Company.

Policy No. 842502 in the sum of $15,000.00, New England Mutual Life Insurance Company.

Policy No. 725936 in the sum of $5,000.00, New England Mutual Life Insurance Company.

Policy No. 725937 in the sum of $5,000.00, New England Mutual Life Insurance Company.

Policy No. 1154064 in the sum of $15,000.00, New England Mutual Life Insurance Company.

Policy No. 5243932 in the sum of $5,000.00, Prudential Insurance Company of America.

Seventh: The parties shall, at any time or times hereafter, make, execute and deliver any and all, such further or other instruments, papers, or things as the other of the said parties shall require for the purpose of giving full effect to these presents and to the covenants, provisions and agreements hereof.

Eighth: The husband shall pay to Joseph M. Paper the sum of $150.00 as and for the wife's attorney fees in representing her in the action of divorce to be hereafter filed by the wife, plus all court costs.

Ninth: That each of said parties fully and clearly understands each and every of the provisions herein contained, and the legal import and results thereof, and of the whole thereof, and that each of the parties has read this agreement in full and executes the same freely and voluntarily, and not under duress, menace, fraud or undue influence, coercion or intimidation of the other party, or of any other person or persons whatsoever, and that in any action between the parties now pending, or hereafter to be commenced, that this agreement shall be offered

in evidence for the approval of the court, and shall be the measure of their respective rights, and that the provisions hereof shall be incorporated in the, or any, decree therein rendered, such order containing a recital that it is predicated upon the terms of this agreement and not upon statutory authority.

In Witness Whereof, the parties hereto have affixed their signatures hereunto in duplicate, the day and year hereinabove written.

/s/ GEORGE S. CARREIRO,
Husband.

/s/ GENEE M. CARREIRO,
Wife.

State of California,
City and County of San Francisco—ss.

On this 7th day of August, in the year one thousand nine hundred and Fifty-one before me, Albert E. Polonsky, a Notary Public in and for the City and County of San Francisco, State of California, residing therein, duly commissioned and sworn, personally appeared George S. Carreiro and Genee M. Carreiro, known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the City and

County of San Francisco the day and year in this certificate first above written.

[Seal] /s/ ALBERT E. POLONSKY,
Notary Public in and for the City and County of San Francisco, State of California.
My commission expires January 9, 1955.

A certified true copy.

[Endorsed]: Filed and Recorded August 21, 1951, S. C.

Admitted in evidence December 28, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorney for the appellant:

Complaint of interpleader with exhibits A & B attached.
Bond in interpleader.
Approval of bond in interpleader.
Process, order to show and restraining order.

Answer and cross-complaint of defendant Carreiro.

Affidavit of mailing.

Answer and cross-complaint of defendant Baekgaard.

Answer and cross-complaint of defendant Irene G. Carreiro.

Affidavit of service by mail.

Decree and injunction in interpleader.

Notice and motion for leave to intervene.

Order.

Order allowing intervention.

Pleading in intervention.

Affidavit of service by mail.

Answer of defendant Baekgaard to pleading in intervention.

Answer to pleading in intervention by defendant Genee Carreiro.

Interrogatories.

Order requiring production of documents dated Sept. 5, 1954.

Order requiring production of documents dated Oct. 5, 1954.

Answer of defendant Irene Carreiro to pleading in intervention.

Answer of defendant Baekgaard regarding documents.

Answer of defendant Baekgaard, etc., to interrog. of intervener.

Interrogatories.

Interrogatories.

Answer of defendant Genee Carreiro to interrogs.

Answer of defendant Baekgaard to interrogs.

Answer of defendant Irene Carreiro to interrogs.

Notice and Motion to require further answers to interrogs.

Order requiring further answer to interrogs.

Deposition of Clifford Melim.

Stipulation.

Order directing deposit of insurance policy with Clerk of Court.

Order staying execution.

Findings of fact and conclusions of law.

Judgment.

Notice of appeal.

Cost bond on appeal.

Designation of record on appeal.

Order extending time to docket record on appeal.

2 Volumes of reporter's transcript of trial.

Plaintiff's exhibits A, B, C, D, and E of which A and B are intervening plaintiffs.

Defendant's exhibits G-1, I-2, P-3, G-4, G-5, G-6, G-7 and G-8.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 29th day of April, 1955.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14750. United States Court of Appeals for the Ninth Circuit. Phyllis Baekgaard, formerly Phyllis Irene Carreiro, Appellant vs. Genee M. Carreiro, Irene G. Carreiro, Individually and as Administratrix of the Estate of George S. Carreiro, Deceased and Wells Fargo Bank & Union Trust Company, Appellees. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed April 29, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Defendant-Appellant, herewith presents the points upon which she claims the Court erred:

1. In holding and deciding that defendant-appellant, Phyllis Baekgaard, pursuant to the terms and provisions of the Property Settlement Agreement and the terms and provisions of the insurance policies in question was not entitled to recovery of the entire proceeds of said policies.

2. In holding and deciding that the deceased-insured, intended to benefit all defendants and Intervener.

3. In holding and deciding that defendant-appellant, as well as defendants-appellees, and intervener-appellee, were each entitled to recovery of one-fourth (¼) of the proceeds of said insurance policies, said holding and decision being based on the stipulations of counsel for defendants-appellees and intervener-appellee, and *not* stipulated to by counsel for defendant-appellant.

4. In holding and deciding that any party other than appellant was entitled to any portion of the proceeds of said insurance policies.

Dated: May 13th, 1955.

/s/ ALFRED JAMES SMITH,
Attorney for Defendant-Appellant, Phyllis Baekgaard

Affidavit of Mail attached.

[Endorsed]: Filed May 13, 1955.